CASES

ARGUED AND DETERMINED

IN THE

SUPREME COURT

OF THE

STATE OF LOUISIANA.

EASTERN DISTRICT, JUNE TERM, 1822.

East'n District. *June*, 1822.

JOHNSON vs. *CROCKER.*

JOHNSON *vs.* CROCKER.

Proof that the defendant had a horse of the plaintiff's for sale, does not support a charge that he purchased it, and is debtor of the price.

APPEAL from the court of the parish and city of New-Orleans.

MARTIN, J. delivered the opinion of the court. This is an action for money lent, and money received to plaintiff's use, and for the price of a horse, sold by the plaintiff to the defendant.

On the plea of the general issue, there was judgment for the former, and the latter appealed.

The facts in evidence are, that Wooters gave the plaintiff a note for about $350, that defendant called for payment (alleging his pos-

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session of the note, and his authority to receive its amount) before the maturity of the note—that at maturity, it was paid in bank.

That defendant was in the habit of obtaining money from Hepburn, on a deposit of notes—and Hepburn collected a note of Dunlap & Wooters for $356, through the Branch Bank of United States, and about the time, paid $300 to the defendant.

That the defendant said he had a horse of the plaintiff's for sale—had agreed to sell him for $280, and afterwards refused delivering him, unless for $300.

A letter of the defendant was produced, dated a short time after all this, in which he acknowleges the benefit he has had from the money of the plaintiff, in his hands; excuses himself from having neglected to send him a gig, and promises to pay on demand.

The plaintiff's demand for money lent is $30, for money had and received $356, for the price of the horse $120. He gives credit for $95, and claims a balance of $400 odd dollars.

The parish judge concluded there was no proof of the loan, but that there was of the other items.

The declaration of the defendant, that he had the note given by Wooters to the plaintiff, the circumstances of his having received from Hepburn, a sum of nearly the same amount, of Hepburn being in the habit of advancing him cash on deposit of notes, and Hepburn having collected $356 on a note of Dunlap & Wooters, would not perhaps suffice to charge the defendant with the amount of this note.

But one of the letters admits the benefit derived by the defendant, from the use of the plaintiff's money left in his hands, and apologises for not sending him a gig. This induces a belief that a larger sum than that of $30, charged as loaned, is referred to; and the presumption which the parish judge has drawn, that the proceeds of the note, *viz.* $356, were alluded to, is not perhaps, the light presumption which moveth not at all.—We are not able to say that he erred in his conclusion, that there is evidence that the defendant in this way received $356 of the plaintiff's money.

We think he was correct in concluding, that the claim of $30, for money lent, is unsupported.

We do not see that the circumstance of

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the defendant having once had a horse of the plaintiff's for sale, is evidence that he purchased it, and promised to pay $120, or any other price therefor.

Deducting from the $356, the amount of the note, the $95 for which the plaintiff gives credit, the balance due him is $261.

It is therefore ordered, adjudged and decreed, that the judgment of the parish court be annulled, avoided and reversed, and that there be judgment for the plaintiff, for the sum of $261, with costs in the court *a quo*; those in this to be borne by him.

Maybin for the plaintiff, *Preston* for the defendant.

MAYOR, &c. OF NEW-ORLEANS, vs. *GRAVIER*.

Any inhabitant has the right to forbid the erection of houses, or other edifices, on public places.

And in a suit already commenced by the corporation of a city, he may in-

APPEAL from the court of the parish and city of New-Orleans.

PORTER, J. delivered the opinion of the court. The petition states that the suburb of St. Mary forms a part of, and is included within the limits of the city of New-Orleans; that it

was established in or about the year 1789, by the late Bertrand Gravier, then owner of the plantation on which it has been founded; who, in the year 1795, enlarged the first plan by the addition of several streets, and a public square, as appears from several plats of survey, drawn by Laveau Trudeau, surveyor general of Louisiana, under the Spanish government.

It further avers, that Gravier sold, with reference to these plans, all the lots surrounding the square. Yet, that one John Gravier, who stiles himself heir to the aforesaid Bertrand, has entered into possession of this property, which, by the act of the former proprietor, was destined for public use.—An abatement of works which he has made there is prayed for, and an injunction against any other being erected.

The defendant, in his answer, denied generally the above allegations.

After the cause had been for some time at issue, Thomas Harman filed a petition of intervention, in which he stated that he was the owner of three lots situated in Camp street, fronting on the square already mentioned, and that he held them in virtue of several mesne

tervene & urge his private right to strengthen that set up by the public.

By the former laws of this country, only one year was allowed after the filing of the papers in the appelate tribunal, to prosecute the appeal to judgment.

And after the expiration of that time, if the appellant did not prove that he was prevented from doing so by some cause beyond his control, the judgment of the inferior tribunal acquired the authority of *res judicata*.

When the appeal did not suspend execution, it was not necessary to cite the party in the inferior court, to shew cause why its judgment should not be confirmed.

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conveyances from John Baptiste Sarpy, who purchased them, together with seventy-one others, from the late Bertrand Gravier, in 1795.

He also alleged, that on the 2d day of May, 1798, the present defendant, John Gravier, presumed so far as to encroach and raise buildings on the public square laid off by his brother, whereupon a suit took place between the said Gravier and J. B. Sarpy, which terminated in two judgments, rendered by the Spanish tribunal, of date the 17th July and 17th Nov., 1798, which judgments ordered the present defendant to leave the ground free for public use, and directed the demolition of the buildings placed there by him. That said judgments have since acquired the authority of the "thing judged," and have that force and effect between the parties thereto, their heirs and assigns: that, confiding in their force and validity, he made the purchases aforesaid, and he, therefore, prayed for leave to intervene, and that he might have permission to shew that the said property should remain open for the public.

To this petition of intervention, Gravier pleaded, that Harman, by his own shewing,

could not be made a party to the suit, and that the facts alleged by him were untrue.

It becomes necessary to examine, before we proceed further in the investigation of the cause, if this exception to the prayer of the intervening party, to be heard, is well taken.

The defendant urges, that as the mayor, aldermen, and inhabitants, are already parties to this suit, Harman, an inhabitant of the city, cannot join in the proceedings for the purpose of enforcing public rights; and if his claim is a private one, it must be presented in a distinct action.

According to the first and third laws of the 22d title of the 3d *Partida*, any individual may forbid the erection of a house, or other edifice, in public places. The necessary consequence of giving this right, is, that the person who makes the prohibition, shall be allowed to apply to a court of justice to aid him in the maintenance of it. It will save expense and delay to permit the party now before the court to do this in the present suit, and as he merely urges his private right to aid the public in the maintenance of theirs, and asks judgment for the same thing, his appearing in the cause creates no confusion.

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Should we yield to the reasoning of the appellant, that the corporation represents all the inhabitants of the city, and, therefore, no individual of that city can be heard; we do not see that it would make any difference in the result. For if they represent all the inhabitants, then they can avail themselves of the rights of each of them, so far as they strengthen and support the public claim.

This point disposed of, we approach the merits of the controversy between the parties in this suit.

The plaintiffs and Harman, who has intervened, insist they should obtain the judgment of this court in their favor.

1. Because the right of the defendant to the premises have been adjudicated on in the suit with Sarpy, and that the matters now in dispute, have passed into the authority of *res judicata.*

2. Because Bertrand Gravier, the ancestor of the defendant, transferred the property now sued for, to the public.

I. It is not disputed between the parties, but there was a suit in respect to the same thing, on the same demand; but it is insisted by the defendant, that he appealed from the de-

cision of the Spanish tribunal, and that his rights are not concluded by the judgment rendered.

A decree was given against the appellant on the 17th of July, 1798, directing that the square, already spoken of, should be left free for the public use, and that the works erected on it should be demolished. From this decree an appeal was taken on the 19th. The 16th Nov. a second judgment was given, that Gravier should take away all the edifices erected on this property. Some delay occurring in the execution of this order, we find that on the 17th of December, the tribunal which had rendered these judgments, declares that the former sentence had the authority of the thing judged, and therefore, directs its execution.

The appeal was taken from the first judgment within three days; on the 15th November the papers were filed in an office in Havana, and the 11th of February, 1799, Gravier presented to the tribunal in this city, his certificate of *mejora*—that he had filed the necessary papers of appeal in that city. It is objected to the regularity of these proceedings, that only forty days were allowed by law for the party cast to file the record in the appel-

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late court; *Novissima Recop. lib.* 11, *tit.* 20, *l.* 2: that only one year was allowed to obtain a decision on it; *Idem*, *l.* 5. *Curia Philipica*, *p.* 5. *tit. mejora*, *n.* 10, and that in default of complying with these regulations, the appeal must be considered as deserted, and the judgment conclusive and binding on the parties thereto.

To this it has been replied, that the period of forty days was the term fixed in old Spain before the discovery of this continent, and that the same regulations could not apply to her possessions in America, where, from the vast distance between them, it was impossible to comply with such a regulation, and that in regard to finishing the cause in one year, that also was, in many instances, utterly impossible, as the appellate tribunal might, from the multiplicity of affairs before it, or from other causes, be unable to examine the case within that time.

It was much debated whether the law, giving forty days to file the necessary papers in the superior tribunal, governed this case. We deem it unnecessary to enter into the question on the reasoning offered, as we find an express authority regulating the mode by which appeals were to be carried from this province.

The regulations on this subject, prescribed by the Spanish government, on taking possession of Louisiana, after directing the manner in which the record shall be made up, go on to declare—that the papers must be presented to the superior tribunal within the delay fixed; which shall be according to the distance from this province, to that where the court of appeals holds its sessions. That this delay shall begin to run from the day the first registered ship leaves this port, for that where the superior tribunal is established; that the judge shall direct the record to be sent by that ship, and if the appellant does not establish that, within the delay given, he has prosecuted his appeal, or that there was a lawful impediment which prevented him doing so, he shall lose the benefit of his appeal, and execution will issue at the first requisition of the opposite party. *O'Reilly's Instructions, p.* 18 and 19.

As the appellant has not proved that this law has been complied with, we know of no other that can govern the case, save that cited from the *Recopilacion*, and consequently we must hold the appeal deserted, and the sentence of the inferior court confirmed. *Curia Philipica, p.* 5. *Mejora, n.* 1.

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Were we to admit that the circumstance of presenting the papers to the superior tribunal, and the receiving of them there, cures this irregularity, another objection must be got over, before we can consider the proceedings in that suit open for examination.

We have seen by the laws of Spain, that appeals were required to be prosecuted in one year to final judgment, unless the party was prevented by some cause beyond his control. It is said, that in many instances it must be impossible to comply with this regulation. We admit the correctness of the observation; but then it is the duty of the appellant to prove those facts which put it out of his power to comply with it. *Curia Philipica, Mejora, n.* 1 *and* 10. This has not been done here, and after a lapse of nearly twenty years, every presumption is opposed to the exercise of due diligence on his part.

The defendant however insists, that the moment the superior tribunal was seized of the cause, the decision of the judge *a quo* could not pass into the authority of the thing judged, and was without any effect until confirmed by the court of appeals. In support of this position, he has cited *Febrero, cinco juicios, lib.* 3,

cap. 1, *sec.* 13, *n.* 490 *and* 491. This author does state the law to be such. Yet we find it expressly laid down in the *Curia Philipica*, *Mejora*, *n.* 1 *and* 10, that if the appeal is not prosecuted within one year, it shall be considered as abandoned, and the sentence of the inferior tribunal confirmed. To reconcile these authors, we must understand the former to speak of the effect which the appeal had within the limitation prescribed by law, for it to be acted on.

As the appeal in this cause did not suspend execution, it was unnecessary to cite the party in the inferior court, to shew cause why he had not prosecuted it. The case of *Croizet* vs. *Le Blanc & al.*, 4 *Martin*, 272, is an express authority on this point, and it is unnecessary to enter again into a question settled by that decision.

It is therefore ordered, adjudged and decreed, that the judgment of the parish court be affirmed with costs.

Moreau for the plaintiffs, *Derbigny* for the defendant.

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BARRY vs. LOUISIANA INSURANCE COMPANY.

BARRY *vs.* LOUISIANA INS. COMPANY.

APPEAL from the court of the first district.

The prohibition of receiving parol evidence against or beyond the contents of a written instrument, only extends to the parties—third persons are not affected thereby.

Barratry cannot be committed by a master who has the equitable title in the vessel.

PORTER, J. delivered the opinion of the court. The plaintiff states that he caused to be made a policy of insurance, which was subscribed by the Louisiana Insurance Company, and by which they engaged, for a certain premium, to insure the sum of $900 upon merchandize, laden on board the schooner Brutus, whereof one Brown was master, upon a voyage from New-Orleans to Neuvitas.—That goods were shipped in which he, the petitioner was interested to the amount mentioned in the policy, that the schooner sailed on her intended voyage, and that the property put on board was lost by the fraud and barratry of the captain.

The defendants pleaded the general issue, the judge *a quo* decided against them, and they have appealed.

When this cause first came before us, the evidence was so unsatisfactory that we remanded it for a new trial, it is now brought up with such additional testimony as the parties have been enabled to produce. *Ante*, 202.

The defence set up is, that the master, Brown, was owner of the vessel, and that consequently barratry could not have been committed by him.

In support of this defence, we had at first the testimony of Nicholson, in whose name the schooner was registered—that Brown purchased her at a sale by the marshal—and that he (Nicholson) had no interest in said schooner, having paid for her to accomodate Brown, who never reimbursed him for the price.

Brown, in obtaining the register, made oath that the vessel belonged to Nicholson—and consequently, the register issued in the name of the latter.

The plaintiff, on the second trial, produced a bill of sale by public act, from one Etienne Debon, to John Nicholson, in which it is stated, that in consideration of a note of $900, made by Wm. Brown to the order of, and endorsed by the vendee, he had sold and conveyed to him all his right, title and interest in the schooner, mentioned in the policy. To do away the effect of this instrument, the defendant offered to prove, by parol evidence, that the conveyance was made by Nicholson, to secure him for his endorsement. The judge

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refused to receive the testimony, and a bill of exceptions brings before the court the correctness of the opinion which rejected it.

Had the opinion of the judge below been given in a case where the parties to a public act attempted to enlarge, or explain, or contradict it by parol evidence, we should not hesitate to express our concurrence with him, but the question now before us, is, whether third persons can be affected by an instrument, at the execution of which they did not in any way assist, which they did not sign, and to which they were neither parties nor privies.

There is no plainer rule of common sense, nor do we believe there is any more universally recognised maxim of law, than that the acts of one man cannot bind another, unless he consents they should. If it were otherwise, our property, our lives, and our liberty, would be at the mercy of the most depraved members of the community.

We frequently, however, enter into contracts, by which our rights are made to depend on acts to be done, or that may have been performed by third persons; in such cases, these acts affect and control us, when

established by legal proof. But the declarations of those persons, that these acts have been executed, cannot be conclusive proof; they are at best but *prima facie* evidence.

Pothier, whom we always consult with advantage, tells us, that an authentic act proves against a third person, *rem ipsam*, that is to say, that the transaction which it includes has intervened. *Pothier*, *Traité*, *des Ob.* 704.

It might at first blush appear that the author intended to lay it down as a principle, that the act thus produced is conclusive, but in a subsequent part of the same treatise, *n.* 766, he observes, that the prohibition of parol evidence against or beyond the contents of an act, extends only to the parties to it; it does not affect third persons.

Evans, in his appendix, states, that this doctrine of *Pothier* is so connected with the essential demands of justice, that it may be stated as an invariable rule of law. *Evans' Pothier*, 223.

In our sister states they act on the same principle, and hold it as a general rule, that parties and privies are estopped from contradicting a written agreement by parol proof; but the rule does not extend to strangers, who

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have an interest in investigating, and knowing the real truth of the case. 10 *Johns.* 230.

And our own law, has embodied and consecrated the same maxim. *Febrero, p.* 2, *lib.* 2, *cap.* 2, *sec.* 1, *n.* 25. *Idem, lib.* 3, *cap.* 3, *sec.* 2, *n.* 141.

A coincidence so general, proves the truth and utility of the doctrine, and it is our duty to apply it to this case, and all others of a similar nature, which may be presented for decision.

Proceeding to do so, we hold the authentic act offered here, evidence that such an instrument was passed between Nicholson and Brown—that fact cannot be contradicted by the defendants. But further, they are not bound by it. The reality of the transaction, the truth of the different averments made in the deed; whether it was a real sale, or one, the object of which was alone to give Nicholson a security for his indorsement; all these matters are open to the defendants, because they never consented to this act, by which it is said the contrary is established. 18 *Johns.* 173. 2 *Ald. and Barn.* 136.

The case of *Chabot* vs. *Blanc*, 5 *Martin*, 354, would appear, unless examined with some at-

tention, opposed to this decision; but that was an action concerning real estate, and there the right of the parties to contradict, or rather destroy an act to which they were not parties, was controled by another principle of our law, which prohibits the reception of parol evidence, to create, or take away a title for immoveable property that commenced by writing. The case of *Richards & Spicer* vs. *Lewis & al.*, 7 *Martin*, 221, turned on the want of allegation in the pleadings.

The cause must therefore be remanded to obtain the testimony offered.

It may perhaps be the means of saving costs to the parties, for us to state, that at the close of the argument, and for some days after, we were of opinion, that as Brown did not pay for the schooner, Nicholson was to be considered as owner, and that he remained so until the vessel was run-away with.—Under this idea, the plaintiff would have been entitled to recover, even taking as true every thing which the defendants offered to prove. After a most attentive consideration of the case, and a close examination as well of the authorities cited, as some others we have been enabled to look into: that opinion has chang-

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ed. We believe that the original character of the transaction (supposing it to be such as is represented by the appellee) was not altered by the subsequent failure of the master to comply with his engagement; that whether the vessel perished or not, he still remained debtor to Nicholson, and that this is a case in which the title is fairly tested by the application of the maxim *res perit domino.*

It is therefore ordered, adjudged and decreed, that the judgment of the district court be avoided and reversed, this cause be remanded for a new trial, and that the appellee pay the cost of this appeal.

Livermore for the plaintiff, *Duncan* for the defendants.

REANO vs. *MAGER.*

The liability of a factor, who sells goods on credit, depends much on the prevailing custom; and of this the jury are the best judges.

APPEAL from the court of the first district.

MATHEWS, J. delivered the opinion of the court. This is an action in which the plaintiff claims from the defendant, indemnification to the amount of the value or price of a certain quantity of coffee, which was received by him, to sell as factor or agent, for the former.

The grounds of liability alleged in the petition are, that the factor had no instructions at all to sell on credit, but that if he had, he sold to one J. Bostwick, who was then in very bad credit, and shortly after failed; and that he, the said factor, after having obtained an order for sequestering the coffee, afterwards suffered the same to remain in the hands of the said Bostwick. The answer of the defendant is a general denial of all the allegations in the plaintiff's petition. The cause was submitted to a special jury in the court below, who found a verdict for the defendant, from which it is to be inferred that they negatived all the material facts alleged in the petition. Judgment was rendered on the verdict, and the plaintiff appealed.

He seems to have been so far satisfied with the finding of the jury, in relation to the facts of the cause, as not to have moved in the court *a quo* for a new trial. It is true that this court, in cases of general verdicts, has the power to correct errors both of law and fact. But according to the current of its decisions, and more particularly in latter cases, much reluctance has been shewn, and properly shewn, to

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interfere with the appropriate duty of juries in the administration of justice, *viz:* the solution of questions of fact.

It would, perhaps, notwithstanding this just reverence for the verdict of a jury, in relation to matters of fact, be our duty, according to the present organization of our judicial system, to interfere whenever it should be made appear that a total disregard to truth, as established by legal evidence, has occurred in the conduct of these judges of facts. From an attentive examination of the evidence in the case now under consideration, we are of opinion that the jury have not erred in their verdict as to the facts. In other words, that they may have come to the conclusions therein expressed, on a fair examination of the testimony.

The liability of the factor for having sold the property of his constituent on credit, instead of requiring prompt payment, depends much on the prevailing custom of this class of merchants in the place where the sale was effected. The special jury, to whom the cause was submitted, was composed principally of commission merchants; men, who must, from their occupation, be most capable of settling the usage which prevails in such cases. Their

verdict establishes the fact, that the defendant did not deviate from the usual course pursued in this species of business.

It is true, that in the English courts of justice, former decisions are opposed to the right of factors to sell on credit. But at the present day, it is almost the universal usage for them thus to sell. See *Livermore on Agency*, 125.

We are therefore of opinion, that the judgment of the district court should be affirmed with costs, which is accordingly ordered.

Livingston for the plaintiff, *Mazareau* for the defendant.

VAVASSEUR vs. *BAYON*.

The defendant cannot amend by withdrawing an answer which contained an admission, & pleading the general issue.

Inconsistent pleas cannot be received.

APPEAL from the court of the second district.

PORTER, J. delivered the opinion of the court. This was an action alleging fraud and deceit in the sale of a slave.

The defendant pleaded that he had not concealed the defects in the property.

After the cause had stood at issue on these pleadings, for two years, and had been once

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remanded from this court for a new trial, the appellant moved to amend his answer: first, by striking out the plea originally filed by him, and substituting in its place, the general issue: and secondly, by adding the general issue to the plea. The court refused permission to do so, and he excepted. There was judgment against him and he appealed.

There is no doubt of the general principle that amendments will be allowed at almost any stage of the cause, when they tend to the advancement of justice. But we doubt much if that offered here comes within the rule. The court below certainly did not possess the right of depriving one party of the confession of another which was on record, any more than it could have refused him the benefit of it, in case it had been extra judicial. If made through mistake, the proper time to have corrected the error, would have been on the trial.

As to filing the general issue with the plea, it could not have been of any use to the defendant. The confession would still have remained in force. We have already said in the case of *Nagel* vs. *Minot*, 8 *Martin*, 488, that a party cannot be permitted to plead the ge-

neral denial, and pleas that are inconsistent with it, and that if he did, the former would be disregarded.

We agree with the district judge on the merits, and therefore order, adjudge and decree, that his judgment be affirmed with costs.

Workman for the plaintiff, *Davezac* for the defendant.

COPELLY vs. *DEVERGES.*

APPEAL from the court of the parish and city of New-Orleans.

An act cannot be attacked as fraudulent after the vendor has paid all his debts.

To avail himself of a feigned delivery against a posterior, real one, the party must bring himself strictly within the law that sanctions his claim.

The mere execution of a notarial sale, does not dispense with the delivery.

This was an action instituted by the plaintiff and appellant, for the revindication of a certain lot of ground, and the buildings thereon, which he claims by virtue of a certain donation made to him of the same, by one named Augustin Bony, deceased, his god-father, on the 24th December, 1787; who, on the same day, had purchased the same from Joseph Copelly, the natural father of the appellant. Deverges, the original defendant, plead that he was proprietor and possessor of the property in dispute, by a deed of sale, execu-

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ted in his favor, from Joseph Defaucheur, a free man of colour, bearing date the whom he called in warranty. Defaucheur appeared and plead that the sale from Copelly to Bony, was fraudulent and simulated, and that it was null for want of delivery against the defendant, to whom alone a tradition of the premises had been made, and also that the claim of the plaintiff and appellant was barred by the prescription of thirty years; and that the donation, under which he claimed, was null and void, for want of insinuation and acceptance. The parish court having rendered judgment in favor of the defendant, the plaintiff appealed.

Hennen, for the plaintiff. The plaintiff claims a lot of ground described in his petition, by virtue of a donation made on the 24th of December, 1787, by Bony to him, then an infant, 18 months old. The defendant now in possession of the lot, avers that the donation is void; 1st, because no acceptance, 2d, nor delivery was made thereof.

I. The defendant's counsel cited the treatise of *Pothier on donations inter vivos*, *sec.* 2, *art.* 1, to shew that (by the laws of France) an ac-

ceptance was absolutely requisite to the validity of a donation. It is admitted that such is the law of France; but with the law of that country this court has nothing to do. The citation is however, of some value, as we learn from it, that by the law of nature, the rule is otherwise. *La solemnite d'acceptation est l'expression qui doit être faite par l'acte de donation de l'acceptation du donataire. Cette expression est une pure solemnité requise pur nos lois, & qui ne le serait pas si les donations eussent été laissées dans le pur droit naturel, suivant lequel l'acceptation, quoique non exprimée, quoique tacite ou designée de quelque maniere que ce fût, aurait été valable. Pothier, Traité des donations, entre vifs.* 12*mo. edit.* 1776, 52. Such is the opinion also of *Antoine Fabre*, in his *Chiliad of the errors of the practioners, Decade*, 48, *Error* 3, *n.* 3.

In *Ferrari's Bibliotheca, Donatio, art.* 1 *n.* 22, 26; we learn, from the opinion of various authors therein detailed, that the law of Spain requires no formal acceptance of the donation; that the silence of the donee will be considered as an acceptance; and that unless it appears that the donation has been rejected, it will be considered as accepted.

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II. That a delivery of the thing is not necessary to make the donation perfect, is well established amongst the Spanish law writers. *Castillo*, *lib.* 3, *cap.* 10, *n.* 53, 56, says, *Hodie donatio statim ut perfecta est, perpetua fit, et irrevocabilis, nec amplius donantem penitere potest.*— And to the same effect *Gomez Resolutiones*, *vol.* 2, *cap.* 4, *de donatione*, *n.* 3, *in fine.* *Febrero*, (1 *vol.* 303. *edit*, 1819, *cap.* 5, *n.* 4,) has expressed the whole doctrine on these two points in the clearest and most satisfactory manner; and to him I refer the court, in support of the principles advanced.

The law on these two points being established, there can be no difficulty on the facts.

On the 24th December, 1787, the donation was made in the usual form; the plaintiff's mother, then his natural tutrix, by whom alone he could accept and take possession, lived in the house and continued to do so until 1817, when she died. From 1805, until 1817, she paid taxes for the property; which establishes her exclusive possession of the lot during that time. 9 *Martin*, 177. For the space then of about 30 years, the donor had not possessed this property, and until the present hour, he

nor his heirs make no claim for it. Assuredly then this donation must be considered as valid, so far as regards the donor.

But the whole was simulated, says the defendant's counsel; fraudulent and void. And where is the proof of this? When Joseph Copelly, the father of the plaintiff, sold this property by a notarial act, in legal and strict form, renouncing every exception, and acknowleging a delivery of the lot to Bony; he was solvent and continued so for 12 years, until July, 1799, when he obtained a respite of five years, and then paid off his debts. No creditor has been defrauded; nor does any even complain of it. But Joseph Copelly, the father, who sold in 1787, continued to live on the property until his death. Yes; but he never claimed it as his property. On the contrary, when in difficulty with his creditors, 12 years after the sale of it by him, and when one of his creditors urged a concealment of a part of his estate, no claims were made against this lot. J. Copelly himself, on his bilan of 1799, to the truth of which he solemnly added his oath, made no mention of it. No one witness has been produced to shew any claim set up by him during all this

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time, nearly 30 years, to this property; and his own most solemn assertion under oath, has not been contradicted by any evidence. If to this is added, that the plaintiff lived on this lot more than ten years, and there held his blacksmith's shop, exercising his trade, without opposition from any one, can a doubt be entertained of the fairness and reality, either of the sale, or of the donation? Or of the acceptance and possession of the lot by the plaintiff?

A conclusion in favor of the plaintiff's demand, must be drawn from the facts of the case, unless the court will fix upon his father the crime of wilful and corrupt perjury. To avoid affixing this stigma upon the plaintiff's ancestor, all that is required, is to ratify notarial acts of more than 30 years standing.—Ten years have been considered as time enough to bar all actions for the rescission of conventions; *Civil Code*, 303, *art.* 204. This court then cannot favourably regard attempts to annul acts of 30 years date.

The criticisms made by the counsel on *Part.* 3, 30, 8, are sufficiently answered by the authorities which have been quoted, to shew that a delivery is not necessary. The *Novi-*

sima Recop. lib. 10, 11, by the opinions of all the Spanish writers, has made a most important change on the subject of contracts; and the very authors, quoted by the counsel, are against him.

Dumoulin, for the defendant. The appellant says he is entitled to a judgment in his favor, because he has shewn a complete title to the premises.

Admitting even this principle which I deny, I contend that his client has no right to the premises, because he has not shewn any legal title.

He pleads on a donation, which has two vices. 1. The want of insinuation; that this is fatal, may be easily seen by referring to *Febrero addicionado, vol.* 1, 332 *and* 343.

2. The want of acceptation, for this *vide Febrero, ad. vol.* 1, 332, *Paz, consultas varias Classe*, 11, *con.* 1, *n.* 5, 149, and the institutions *du Droit Belgique, par George de Ghewiet, vol.* 1, 267, *art.* 4, 5, *et seq.* I cite this work, because the author deduces the necessity of an acceptation of a donation, from it having been in that country, determined that donations were contracts, or *pacts*, which they are con-

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sidered, by the Roman laws, and consequently must be accepted, and ratified to be valid; *vide Lecons du Droit Civil, vol.* 2, 40, *et seq.* I also cite this work, because it affords a good commentary on the laws of Spain, as that country was long under its dominion.

Other defects might be shewn in this donation, but the above are sufficient to destroy its validity; since it is a known and fixed principle of our law, that donations are always to be construed and judged by the rules of strict law, and are vitiated by a want of any of the formalities or qualities which the law requires they should have, and be accompanied with.

But, not only is the title of the appellant thus defective and vicious: suppose it for a moment valid, it cannot avail him in this case against a third possessor. He, the appellant claims from a man who never was in possession of the lot, or rather half lot of ground in question. This results from the proof on file in this case, which shews the deed of sale to Augustin Bony, to have been fraudulent and simulated; but I may be told, that though Bony never was in actual corporal possession of the half lot in dispute, yet, that by law, *to*

wit, the 8th law, *tit.* 30, *part.* 3, he is to be considered in possession, by virtue of the deed. But this court has already decided in respect of this law, that delivery of title is not sufficient, against third persons; and in looking over the record of the case of *Pierce* vs. *Curtis*, on file in this court, I feel I can confidently invoke the favor of the court for my client. In that case, the judge, who gave judgment, said, that though the delivery of slaves is considered as made, when such delivery is made to result from the deed of sale, yet that such constructive delivery did not appear from the words of the sale in that case; yet, what were the words in that deed? They were as follows—grant, bargain and sell, assign, transfer, and set over; with besides, a clause of mortgage on the slave for the security of the payment of the price, which mortgage is subsequently released by a deed of acquittance and release. I need not observe to the court, that in countries under the empire of the civil law, and where a simple delivery of the title was not sufficient to presume a delivery, yet a clause of mortgage always had such force as to carry with it the presumption of delivery; yet in the case

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of *Pierce* vs. *Curtis*, notwithstanding these strong points, the judge who gave the opinion, always favoring the equity of a case, declared that constructive delivery could not be presumed from the words of the act of sale, and besides, that there was evidence that the slave always remained in the possession of the vendor; compare this case with the one actually before the court. Is there any clause in the deed of sale from Copelly to Bony, from which a constructive delivery can be drawn? There is no mortgage reserved, no clause of *constitut*, no acknowlegment of being put in possession, on the part of the vendee, Bony; there is no delivery made in any other way as pointed out in the *5th law of the* 30 *tit. part.* 3, where it is said, among other things, that two things are necessary to acquire possession of a property, such as the one in dispute—do either of these result from the deed of sale, signed by Bony? Or is there in fact any thing from which a feigned delivery can be presumed. See on this point *Pothier*, *contrat de vente*, *vol.* 1, 327, *n.* 313, *and n.* 321, where he expressly treats this question, whether a feigned delivery should have the same effect as a real one, in relation to third persons; he sets

out with saying, that there is a difference of opinion, and states, that while one set of learned men decide in the negative; another class, among whom he particularly cites *Guy Pape*, decide for the affirmative; this last opinion *Pothier* thinks most reasonable. As it seems to be against me, allow me to call the attention of the court to the kind of feigned delivery, which *Guy Pape* thinks sufficient: It is said, that the *tradition feinte qui resulte de la clause de retention d'usufruit, ou de la clause de retention de la chose a titre de ferme ou loyer, ou meme par la simple clause de constitut, &c.* The definition of feigned delivery, given by *Pothier* in *n.* 313, above cited, shews that this was the kind of feigned delivery he meant; that justice forbids that it should be such a kind of delivery, as is made to result from the simple delivery of the title, as you have already decided in the above named case of *Pierce* vs. *Curtis*, where the delivery was nothing more than in this case; a simple declaration of alienation to the vendee. I have thus far only argued on what results from the literal proof on file in this case; since the adverse counsel seems to ground some hope on the testimony to which I thought he could not decently ap-

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peal, let us see what it developes;—the adverse counsel contends, that Copelly, the father, did not continue in possession of the house in dispute, after the sale and donation, but that it was the mother of the appellant; that is the concubine, the *menagere* of Copelly. Can such an allegation be decently or respectfully made? I am sure it cannot be successfully contended. It is proved that Copelly, the father, always remained in possession; that he never ceased to be in actual corporal possession: all the witnesses, with the exception of one or two colored ones, declare that the house and half lot were always reputed his. In fact, the testimonial proof duly considered, shews the entire and true features of the case; it shews the sale to Bony to have been fraudulent and simulated: which is the more confirmed by the pretended donation to a bastard, which would seem to confer on a concubine a title to property, which she wished to preserve for the man, to whose coarse voluptuousness she ministered. This court will not surely, in such a case, give a favorable construction to the possession of a concubine. It is to be remarked that not one single witness has ever said that the house and half

lot were reputed to belong to the appellant, but one (who is the only one) who alleges that it was said to belong to his mother, and never mentions the name of the appellant; the appellant himself never possessed: he is since fourteen years back, of the age of majority, and never until the year 1819, pretended any right to the house and half lot, although long after, and before his majority, he was driven from it by his natural father. As to the payment of taxes, the appellant can draw nothing in his favor from that; as his mother never paid taxes, as his tutrix; but always as proprietor of the house and half lot, which we have shewn that we did, since the moment that we purchased the place.

I now come to an argument which I believe the court will deem of sufficient authority to decide this case; I draw it from the law of the *Partidas, to wit, the law 50th, tit. 5, part. 5*, which says, that if a thing be sold to two persons, and has come to the possession of the second purchaser, that second is to be preferred. I say with respect, and with confidence, that this law decides the question; because, even giving to the appellant the full benefit of that law of the *Partidas* above cited.

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which says that delivery of the titles works a delivery of the thing; yet, when I consider how the equity of this court has chastened that law, and when I look and reflect on the words of the law of the *5th Partida*, as well in the original as in the translation, made by direction of our legislature, I feel, I repeat, some confidence in appealing to it. In the translation, it is as I have above quoted: if the second purchaser come to the possession of the thing, and has paid the price, it will belong to him, and not to the first. The words of the original are, *si el posterior comprador possesse a la tenencia, e a la possession, e pagasse el precio, que el la deve aver, e no el primero.* The court will observe, that the legislator does not content himself with the word possession, but prefixes to it the word *tenencia;* which means the real corporal act of holding, as may be seen, by appealing to the best dictionaries of the Spanish language. And to whom is this *posterior comprador* preferred? To one who actually possessed; not simply to an imaginary possessor, but to one who *posea a la tenencia de la cosa e pago el precio*, as is stated in the law referred to. It never could have become so difficult, so *vexata questio* as it is, if

the mere giving a title or deed of sale, was construed to work a delivery, to the injury of third persons; such a construction would be the greatest protection and cover to frauds, of all descriptions, and this court in giving its opinion in the case of *Pierce* vs. *Curtis*, fully felt the force of it. If the mere delivery of a deed of sale, was a full and complete delivery, in regard to third possessors, would *Gregorio Lopez*, in commenting on this very law, of the *5th Partida*, with the knowlege which he must have had of the previous law of the *3d Partida*, giving such virtue to a mere delivery of title, have said, *Quid si utrique tradita fuit possessio, neque constaret cui primo fuit tradita?* Since the dates of the deeds of sale would always decide the question, and the only enquiry would be, who bought first by a public deed, when he would be preferred. Taking the opinion of those who deem a delivery by title sufficient, they decide in favor of my client: since every one of them, from *Guy Pape*, above cited, to the present day, requires something besides the mere fact of alienation; they all require some clause, as that of *constitut*, or some other similar, such as giving of *usufruct*, or hiring to the vendor, or he acknowleging that

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he possessed for, and in the name of the vendee; see even the much relied on authority of *Gomez*, who, in speaking and delivering his various opinions on this subject, always speaks of *traditio per actum fictum;* and in writing on this subject, uses these words, *quia in emptorem, cui est facta traditio, translatum est dominium, et plenum jus rei mediante titulo et traditione. Gomez, var. resol. cap.* 2, *n.* 20. even in that part of that number where he seems in favor of the appellant, he uses the words *facta traditio per actum fictum: alteri vero per actum verum;* meaning that in relation to third persons, delivery must be made by some of the modes signified in the *6th law, tit.* 30, *part.* 3; for it is only between the original parties, that the mere delivery of title, which the *8th law* of the same *tit. and part.* says is sufficient, can equitably be said to have effect; for this I appeal to every commentator, and for an apposite authority on the case, I beg leave to refer the court to the above mentioned work, on *Belgick law, vol.* 2, *p.* 33, *art.* 13, and same *vol.* 25 *and* 26, *art.* 20, which expressly says, that he who is first actually in possession, is to be preferred to an anterior purchaser, to one who was first *adherité*, to him who had the first patent; *vide* also *Siguenza de Clausulis, fol.* 86, *cap.* 14.

But I rely on the authority of *Gomez* himself, when I consider the facts of this case as developed by the testimony on record. In the same work of his above cited, and in the following page, he supposes our case, and decides it in our favor; he says, that the second sale, made in good faith, is to be preferred to a prior one, which was fraudulent; he goes further, and says, it is to be preferred, although it was characterised by fraud, or at least, that it is the opinion of those who do not join him thus far, that at least the goods or property of the seller must be discussed, before recourse is had to the second purchaser. That we are purchasers in good faith, cannot be denied; that the sale to Bony was fraudulent and simulated, strongly results from the evidence.

Suppose, however, that this court should nevertheless feel some doubts in this cause, these very doubts are as many arguments in favor of my client; on the strength of legal maxims, I invoke them in his behalf. In civil as well as in criminal suits, the cause of the defendant is most favorable; in cases of doubt, he, who is in possession, ought to be maintained. *Melior est conditio possidentis et rei quam actoris; erit potior possidentis conditio.*

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In pari delicto, vel causa, potior est conditio possidentis. Melior causa sit posidentis, quam petentis. The learned *Paz* considered these maxims of such force, that in a case of liberty, he decided in favor of slavery. *Vide, Var. Con. Classe,* 1 *consult,* 40 *n.* 243.

Moreau, on the same side. The question before the court, is, whether a feigned tradition of an object sold or given, is operated by the simple fact of the passing or execution of the deed by which the alienation of the object is intended to be made, or is it also requisite that the deed be delivered to the transferee.

The manner in which the 8*th law,* 30 *tit.* of the 3*d Partida,* has been translated into English, may have given rise to the idea that the simple execution of the deed of alienation operates a feigned delivery, without being accompanied by a real tradition of the title. But if we carefully examine the original, and the translation, we will be fully convinced that besides making a new act, it must be delivered to the transferee, in order to operate a delivery, such as is contended for. In effect, the words in the original are, *o faziendo otra de*

nuevo e dando gela. And in the translation they are rendered, and makes, and delivers to him a new one. Hence we must be convinced that this law requires evidently two things in order for the transferee to acquire lawful possession: 1st. the execution of the deed of alienation in his favor; and 2d, the delivery of the title to him.

This delivery of the deed is absolutely necessary to operate a fictive tradition. It may be considered the symbol and characteristic, as when a person gives possession of a field or tenement to him who acquires it, by pointing to it, so that he may see it, although he does not really enter upon it.

The making of a new title, is not therefore sufficient. This title must besides be delivered to him who acquires, and this evidently results from *Gregorio Lopez's* Latin translation of the same law. *Per traditionem literæ emptionis vel donationis rei, vel faciendo literam emptori, vel donatorio acquiritur passessio, literam recipienti.*

It then results from this translation of *Gregorio Lopez,* that a fictive tradition can be had in two ways, 1st, when the transferor delivers to the transferee, the titles by which

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he, himself, holds the things; and 2d, in executing a new deed of alienation, and delivering it to the alienee.

But it is evident that in order to operate a feigned tradition in this second manner, two things are necessary to concur in doing it, 1st, that the alienor execute a deed of alienation; and 2d, that he deliver this instrument to the alienee.

This is what we find clearly explained by *Antonio Gomez*, in his commentaries on the 17*th and* 44*th laws of Toro*, which laws being posterior to those of the *Partidas*, ought to serve us, we may presume, in coming to the right understanding.

In the text of the 17*th law of Toro, vol.* 2, 102, *of Gomez*, the question is treated of a donation, which a father or other ascendant may make to his descendant, to the prejudice of others, whither by donation *inter vivos*, or by act of last will and testament; and it is there stated, that if the donation is made *inter vivos*, and if possession is given of the thing, or the deed delivered in the presence of a notary, *o le overe entregado ante escrivano escritura d'ella*, a donation thus made shall be irrevocable.

In the 44*th law of Toro, vol.* 2, 131, the subject of *majorats* is treated of, and it is stated that a father may revoke such of these *majorats* which he may have constituted in favour of any of his children, unless he should have done so by an act *inter vivos*, by which he should have given him possession of the objects composing the *majorat*, or should have delivered the deed in presence of the notary. *O l'oviere entregado la escritura d'ello anté escrivano.* We see that the legislator, in both these cases, uses the same expressions, in relation to the delivery of the title or deed of donation.

We must suppose that by the expressions, *entregado la escritura d'ello anté escrivano*, the legislator meant not that the feigned or symbolic delivery could be effected by the simple act of the execution of the deed of donation in presence of the notary, if this manifestation of his will is not accompanied by the actual tradition made by the donor, to the donee of the title of donation. In fact, the manner in which *Gomez* reasons on this subject, as to the delivery of the title in the presence of the notary, leaves no doubt on this subject, that it is indispensible in order to effect a feigned delivery of the object given.

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Here then is the manner in which *Gomez* expresses himself; he asks if possession is given by the delivery of the old or the new deed, to the donee. *An requiratur*, says he, *traditio instrumenti novi vel antiqui, ut transeat possessio, Gomez, vol.* 2, 233, in the summary, at the head of his commentary, on the 45 *law of Toro n.* 57:—The following is the way in which *Gomez* answers the above question: First, as to the fictive tradition which may be effected by the delivery, which the vendor or donor makes to the vendee or donee, of the ancient titles by which he possessed himself the thing alienated, *Gomez* says, *item adde quod ista conclusio et doctrina quæ habet quod per traditionem instrumenti transit possessio ipsius rei, debet intelligi quando traditum instrumentum in quo continetur quo vel titulus, mediante quo tradens habuit illam rem, &c. Gomez, vol.* 2, 264, *n.* 57. No doubt then but that the delivery by the vendor or donor, to the vendee or donee, of the titles by virtue of which he himself possesses the thing alienated, operates a feigned delivery of that thing, which we find is in conformity to the first part of the 8*th law*, 30 *tit.* of 3*d Partida* which declares that a feigned delivery is effected by the delivery of the titles,

by virtue of which the donor possessed the thing *apoderandole de las cartas par que la ello ovo.*

But it must be here observed, that in order to operate the feigned tradition by the first of these means, it is necessary that the title of the donor be really delivered to the donee; that that delivery, agreeable to the 17*th and* 44*th laws of Toro,* be made in presence of the notary, and, what is a natural consequence, this delivery must be verified by the notary in his deed; because it cannot be supposed that proof can be made of a fictive tradition, which consists in facts or expressions purely symbolical: as when a vendor makes a delivery agreeable to the 29*th art.* 350, of our *Code,* either by the delivery of the titles, if there are any, or of the keys, if it is an enclosed place, or in giving to the purchaser a view of the thing, or in consenting that he should possess for him, unless all these things are expressly mentioned in the deed of alienation.

Let us now return to *Gomez,* and see how he explains the second manner in which a symbolic or fictive delivery is made. It is by the delivery of the new title, which the alienor makes to the alienee at the time of executing the deed? We perceive in reading this

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same passage, in *n.* 57, that anciently some authors contended that the delivery of the new title of alienation was not sufficient for a feigned delivery, unless it was accompanied by that of the old titles, by virtue of which, the alienor himself possessed the thing by him alienated; but that these doubts were removed by the new laws, which had corrected this old doctrine, and that at present it is sufficient to deliver the new title. *Gomez* on this subject, expresses himself in the following terms. *Hodié tamen aperté istud corrigitur, per leges nostri regni, imo quod sufficiat traditio instrumenti novi presenti alienationis; ita probat et determinat, l.* 8, *tit.* 30, *part.* 3.

But nevertheless, in agreeing with *Gomez*, that agreeably to the said law, 8*th*, *tit.* 30, *part.* 3, the simple delivery of the new deed of alienation is sufficient to operate the fictive delivery of the thing, it is clear that this word delivery, *traditio instrumenti*, cannot be understood as to mean the simple execution of the new deed, for besides that, the Latin words of *traditio instrumenti* can admit of no doubt; it will be granted, that if a delivery took place by the simple fact of the execution of the deed, and by the consent of the parties, the

whole system of feigned and real traditions would vanish, and third possessors would in consequence be deprived of any recourse which they might be warranted to exercise on the thing alienated in the interval between the execution of the deed, and the real or feigned delivery of the thing, and we must here observe, that *Gomez* in all his observations in his commentaries on the 17*th and* 44*th laws of Toro*, considers that the principles of feigned delivery which regulate donations, should likewise apply to sales, and that one should not be more favorably viewed than the other.

If the fact of the tradition, or delivery of the deed of alienation, could for a moment have been confounded with the passing of the deed itself, that must arise from the difference which exists between our usages, and those which subsisted when the laws of the *Partidas* and of *Toro*, which require this delivery were passed. Nowadays the parties go before a notary, who takes notes and makes the original, and often does not deliver a copy, unless he is required. On the contrary, under the Spanish government, and particularly at the period of the promulgation of the *Partidas*, the notaries held a book of notes, in

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which they entered a memorandum of the conventions agreed on between the parties. It was from these notes that they drew out the true original or exemplification of the deed, which was always delivered to the party by whom it was held as the original, and the deed thus delivered was so truly the original, that in case of its being lost or destroyed, it was necessary to the judge, for his authorization to the notary, to draw out another original, which supplied the place of the first, and which was taken from the notes which the notary had preserved. The 10*th*, 11*th and* 12*th laws of the* 19 *tit.* 3*d Partida*, contain several enactments on this subject.

It is then easy to understand what the laws of the *Partidas* understood by this delivery, of the deed of alienation, and until this delivery was made, there was, in reality, but a symbolic tradition. We must then conclude, that the donation made to the plaintiff and appellant, by virtue of a deed of which the notary alone possessed the original, could not operate a feigned delivery in his favor, unless the notary should have expressly stated that a copy thereof was delivered to him.

MATHEWS, J. delivered the opinion of the court. In this case, the plaintiff sues to recover a house and lot described in his petition. The written evidences of his title, are, a deed of sale from Copelly, his reputed father, to one Bony, and a deed of gift from the latter to him; both executed before a notary public, on the 24th of December, 1787. The defendant, who has possession of the disputed premises, sets up a title derived from the same original proprietor, Copelly, sen., who sold, conveyed and delivered the same to one Defaucheur, by authentic act, executed on the 6th of September, 1817, who, on the 18th of May, 1818, sold to the defendant by a similar act of sale. Other evidence in the cause, supported by written documents and oral testimony, shews that Copelly the elder, under whom both parties to this suit claim title, was, in the year 1794, in embarrassed circumstances, and that he filed his bilan, in which no claim is made to the property, the subject of the present contest; that he and a free negro woman, called Rose Grondil, the mother of the plaintiff, and concubine of his father, remained in possession of said house and lot, either both together, or one of them, up to the year

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1817, the date of the sale to Defaucheur; that during this period, Copelly, the father, improved the lot by buildings and repairs, for which he paid out of his own funds. Rose paid taxes on the property, as her own, for several years; and the plaintiff occupied and used a small house thereon as a blacksmith shop, during some time. It is agreed that Copelly, sen., paid off and discharged all his debts.

Judgment being for the defendant in the court below, the plaintiff appealed.

He claims a reversal of said judgment, and that the property sued for should be here adjudged to him; relying on the validity and strength of his title, his own possession, and that of his mother. In support of the judgment of the court *a quo*, the appellee assumes three principal grounds of defence: 1. That the acts, both of sale to Bony, and donation to the appellant, are feigned, simulated and fraudulent. 2. That they did not convey the property, and transfer it in full dominion, for want of delivery to the first vendee, and also for want of acceptance and delivery under the act of donation. 3. That the plaintiff's action is barred by the prescription of 30 years, &c.

The possession of Copelly, sen., appears not

to have been entire and exclusive, during the whole time which elapsed from the date of the sale and donation in 1787, until the last sale in 1817. Rose Grondil, the mother of the plaintiff, lived in the house, and paid taxes for it as her own. Copelly, jun., also occupied a blacksmith shop on the lot. At the period of commencing this action, in February, 1819, it appears that he was about 32 or 33 years old. When he acquired title by donation, it is stated in the act, that he was of the age of 18 months. Prescription could not affect his rights during his minority, unless it be that of the longest time, which begins to operate on the claim of minors, only after they have arrived at the age of puberty, (admitting that it can in any case affect them.) On this view of the subject, we are of opinion that the plaintiff's action is not barred by prescription.

To shew that the sale to Bony, and the donation from him to the appellant, are feigned, simulated and fraudulent, no evidence is offered except the record of the proceedings which took place in 1794, on a charge of fraud against Copelly, sen., in relation to his conduct as an insolvent debtor; and the cir-

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cumstance of his still remaining in possession of the property, after said sale and donation. Whatever might be our opinion as to the nullity of these deeds, on the ground of simulation and fraud between the plaintiff and creditors of Copelly; between the parties to the present contest, it is believed that no legal evidence has been adduced, sufficient to destroy their validity, on account of these alleged defects. As to fraud, there certainly is no foundation for it, after admitting that the vendor has paid all his debts.

Having thus disposed of prescription and simulation; we must take into consideration the questions which relate to acceptance and delivery; believing that on a just interpretation of the Spanish laws on these subjects, depend the claims and rights of the parties litigant.

In examining these questions, it is proper to commence with that which relates to the defect of title, said to have originated in the want of delivery of the property, under the sale of Copelly to Bony, the donor of the plaintiff.

The law 50th, of *tit.* 5, *Part.* 5, on this subject, seems to be so clear, in giving a pre-

ference *in rem*, to the last of two purchasers of the same thing, to whom it has been delivered, as to leave neither doubt nor difficulty in the case, but lead directly to a conclusion favourable to the pretentions of the defendant. Opposed to this the appellant insists: 1st. That Copelly, sen., did not continue to possess the property in dispute, as owner, up to the time of sale to Defaucheur; and that the real and *bona fide* possessor was Rose Grondel, representing her son a minor, who claims under the act of donation, from Bony the first purchaser; to whom at least a feigned tradition had been made according to the law 8th, *tit.* 30, *Part.* 3, wherein it is stated, that "when one man gives another an estate, &c.," and delivers to him the title he already has, or makes and delivers to him a new one, the donee will acquire possession of the thing, though it had not been delivered to him corporally. As to the first ground assumed by the appellant, its solidity depends entirely on the effect which ought to be given to the act of sale to Bony. If it operated a feigned delivery, then the dominion of the property passed from the vendor to him, and the former no longer possess-

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ed as owner, and could not give a valid title to the subsequent buyer, by sale accompanied with real tradition. The law, on which this feigned delivery is attempted to be based, seems, when taken in its full extent, to be somewhat inconsistent with the law first cited, relating to sales of the same thing, made to two persons, which gives a preference to the last purchaser, who has obtained possession. If the new title referred to in the former law be considered the act of sale, or donation by which the transfer of the property is made from the owner to the purchaser or donee; it would lead to this result, that in all cases of sale or donation, made and executed in writing, no delivery of the thing intended to be conveyed, would be necessary; the possession of the title, or act of sale being equivalent to actual and corporal possession; and would thus destroy the whole doctrine of law on the subject of tradition and dominion of property. The inconsistency would be less; if according to some of the doctors of the civil law, this feigned mode of acquiring possession, should be restricted to the delivery of the written instruments of the original right and title of the proprietor; or as suggested

by others, the expression in the law 8*th*, *tit.* 30, *Part.* 3, *o faciendo otra de nuevo* should be understood of a new title substituted for the old, which had been lost or destroyed. However, a contrary opinion seems to be holden by *Gomez*, in his commentary on the 45*th law of Toro*, *n.* 56 *and* 57.

It is perhaps true that a feigned delivery to a first purchaser gives him a preference over a second, to whom real tradition may have been made. See *Gomez*, *var. resol. tit. de evictione et venditione.*

Without attempting to reconcile and settle the differences between these doctors, we believe it may be safely laid down as a principle of self-evidence, that a person who claims the benefit of a fictitious act of tradition, in opposition to a real one, must bring himself completely within the law which sanctions such fictions.

It is necessary that the title should be delivered, whether new or old. In the present case there is no evidence that the act of sale to Bony was ever delivered to him, unless it be considered, that being executed before a notary public, is equivalent to delivering an act under private signature. The law makes

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no distinction, and we ought not: a *copia original* (as termed by the Spanish law) could have been easily obtained, and delivered in presence of the notary. We are therefore of opinion that the house and lot now in dispute, were never, either by act real or fictitious, delivered to Bony; that he never had possession of them, and consequently could have given none to Rose Grondel, the mother, or to the plaintiff, under his act of donation. We conclude, that Copelly possessed the premises in dispute, in virtue of his original title, until the period at which he sold to the warrantor of the defendant, who seems to have had possession under said sale, and to have sold and delivered to the appellee.

This view of the cause renders it unnecessary to investigate any matter which relates to the question of acceptance under an act of donation, according to the Spanish law.

Before concluding, it may not be improper to advert to a note in the translation of the *Partidas*, by *Moreau & Carleton*, on the law relating to the delivery of titles. This note refers to the case of *Pierce* vs. *Curtis*, in which the translators seem to consider the decision as contrary to the text. That case was decid-

ed on rules of the *Code*, which establish the mode of fictitious delivery, by expressions to be used in the instrument of sale. Here, as in the present case, and as it should be in all similar cases, the fiction was limited to the strict words of the law.

It is therefore ordered, adjudged and decreed, that the judgment of the parish court be affirmed with costs.

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Moreau, on an application for a rehearing. The court considers the conveyance which the legislature directs the sheriff to deliver to the purchaser of property sold under a *fi. fa.* as so essential to the validity of the sale, that the smallest clerical error, in the description of the judgment, is fatal. That such a sale is of no effect, without the sheriff's conveyance, and so the property of the thing seized is not immediately and really transferred to the purchaser by the solemn adjudication made by the sheriff.

Immoveable property, at a sheriff's sale, does not pass by the adjudication: his deed is essential.

Parol evidence cannot establish the sale.

An heir, who has accepted, with the benefit of an inventory, is entitled to the possession and administration of the estate.

If there be other heirs, their rights will be noticed, when they appear.

A possessor in good faith, does not owe fruits, till after

In sales of lands or slaves, by individuals, it is true the written conveyance is essential

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to the transfer of the property. But this is the result of an express derogation, introduced, *Civ. Code*, 344, *art.* 2, to the general rule. *Id.* 346, *art.* 4.

a judicial demand.

A just title is that which is of a nature to transfer the property. So that, if it be not transferred, it is owing to a want of right in the grantor.

A purchaser at a sheriff's sale, by a defective title, owes fruits from the judicial demand.

Forced sales, under a *fi. fa.* were not in the contemplation of the legislator, when this exception was enacted; for he has expressly provided that they shall be made with the formalities particularly prescribed therefor. *Id.* 490, *art.* 1, 2, *and* 3. And it is expressly provided, that the seizure, or forced sale of a debtor's goods, transfers the property of them to the vendee. We humbly insist that this is effected by the mere adjudication.

This was the case under the Spanish law. *Part.* 5, 5, 52.

The adjudication, at a public auction, ought to be considered as forming an efficacious and indefeasible contract, which cannot be retracted. Consequently, the last bidder may be compelled to pay the amount of his bid, even by the imprisonment of his person.—*Curia Philipica, Remate, sec.* 22, *n.* 26.

There cannot be any doubt, that in sales by auctioneers, in this state, property passes by the mere act of adjudication; especially when it is attended with delivery. It operates a

complete contract between the owner, by whose directions the sale is made to the vendee. It imposes on the one the obligation of delivery and warranting the thing sold; on the other, that of paying the price. These respective obligations do not result from the certificate, which the auctioneer is directed to deliver to the vendee, who may, even before he receives this document, transfer his right.

The act of January 15, 1805, makes it the duty of the auctioneer, immediately after the sale, to deliver to the vendee a memorandum of the sale and purchase, designating the object and day; so that such purchaser may cause the same to be registered according to law. 1 *Martin's Digest*, 551.

It cannot, certainly be concluded, that this memorandum is so much of the essence of the sale, that the want of its delivery, or any error in the description of the thing sold, or the dates, should avoid the adjudication; and that the vendee may not establish the sale by other proof, nor be allowed to shew, and procure the correction of any error in the memorandum.

The intention of the legislator was to pro-

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cure to the last bidder authentic proof of the adjudication; not to deprive him of the faculty of establishing the sale, by other than the written proof required in private sales of land or slaves.

A close attention to the section of the act of the legislature, which requires sheriffs to deliver to purchaser, under a *fi. fa.* a conveyance of which it prescribes the form, will shew it couched in the same imperative terms, as that which relates to the memorandum to be delivered by the auctioneer. The only difference is, that in cases of sales under a *fi. fa.* the conveyance is directed to be recorded, and a certificate of this record, endorsed on the original, which, after these formalities, may be received as evidence, in every court of the state. 2 *Martin's Digest*, 335.

It is evident that this conveyance is not intended by the legislator, as an essential and indispensible requisite to the validity of the sheriff's sale. He intended only to establish a rule of evidence, and enable purchasers to prove the sale, by other than testimonial proof, always precarious and liable to perish. Had he intended to confine such purchasers to written proof, he would have said, as in the

case of sales by individuals of land and slaves, that testimonial proof shall not be received. Provision is indeed made for the admission in evidence of the original conveyance of the sheriff, with the endorsement of the certificate of its record thereon; but it is not said that other legal proof of the adjudication is to be rejected.

Legal proof cannot be presumed to be excluded; but in this case, the words of the legislator manifest his intention of giving a new manner of proving, without taking away any; for, he says the sheriff's conveyance is to be received as legal evidence; assimilating this mode of proof to other modes existing before, which are not, from any expression used, taken away.

The act forbids the record of the sheriff's conveyance, if there be any erasure or interlineation, not noticed before the execution of the conveyance. If this document be the only legal evidence of the adjudication, a purchaser will be totally disabled from establishing the adjudication, under the construction adopted by the court, if there be any erasure or interlineation, not noted before the execution of the conveyance; even when able

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to shew by irrefragable, and even written and authentic evidence, that such erasures or interlineations were actually made, before the execution of the conveyance, and in order to render it conformable to the real terms and conditions of the sale, which had at first been mistated. A construction equally opposed to the letter and the spirit of the law.

If the sheriff's conveyance was the sole legal evidence of the adjudication, it would follow that the purchaser might be deprived of his right, by the death of the officer, before the execution of the deed.

Let it not be said that without the sheriff's written conveyance, there is no adjudication, no sale, no expropriation. This would be to confound the formalities which ought to precede, with those which ought to follow it, in order to preserve the evidence of it.

The first are matter of rigor, their absence or insufficiency prevents the adjudication taking place.

It is true, if a sheriff sell a debtor's goods, without the previous advertisements, which the law requires, he transfers not the property of the latter: but it cannot be concluded from the requisition of the legislature, that the sheriff

should execute a conveyance, that the want of it occasions the nullity of the adjudication.

Perhaps the common law of England has adopted the principle, that every formality which a statute requires ought to be rigorously fulfilled; but it is repealed by the civil law.

The latter distinguishes whether the statute has used imperative or prohibitive words.—In the latter case nullity ensues, although not pronounced. Not so, in the other case, unless the nullity be pronounced, or the formality be of the substance of the instrument. *Civil Code*, 4, *art.* 12, 1 *Jurispr. du Code Civ.* 66, 67; *L.* 1, 14, 5.

The law which requires the sheriff's conveyance, in a sale under a *fi. fa.*, containing no negative words, the absence or irregularity of such a conveyance does not occasion the nullity of the adjudication. The legislator has not pronounced it, as he did, in case of sales by individuals, of land or slaves: and the conveyance is not of the substance of the adjudication. It cannot be urged from the circumstance of the act containing the form of the conveyance, that the legislator intended to make this form a matter of substance. One of the titles of the 3*d Partida* is full of

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forms of acts, prepared by legislative authority. Yet, it never was contended that any other form could not be used, provided it contained what is of the essence of the contract; as in an act of sale, the enunciation of the thing sold, the price, and the consent of the parties.

If, therefore, the delivery of a conveyance or memorandum, be not an indispensable requisite of an adjudication: if it add nothing to its force or validity; if the adjudication be *per se*, an efficacious and irrevocable contract, creating obligations between the parties, and transferring property; if it cannot be retracted; if the conveyance or memorandum be useful only to the proof of the adjudication; which is independent therefrom; if the adjudication be susceptible to be proved by other legal evidence, in case a fortuitous event prevents the execution of the conveyance or the delivery of the memorandum, as the death of the sheriff or auctioneer, or if the conveyance, on account of erasure, or alteration properly made, but not timely noticed, afford no legal proof of the adjudication; this court will likely be induced to conclude that if an error has crept in thro' misinformation of

the authority under which the sheriff acted, this circumstance will not be so fatal as to absolutely destroy the party's right, and prevent him to establish, if he can, by the record, that a valid adjudication took place.

The authority of the sheriff, to sell a debtor's property, may appear, not only in the conveyance which he gives to the vendee; but in the *fi. fa.* on which he made the seizure, and his return thereon.

Hence, the title of the defendant to the slaves of V. Dufour, sold by the sheriff, is incontestibly proven. The possession which he has received, and the sheriff's receipt for the price, put it beyond doubt that the sale was made to the defendant. The sheriff's authority to seize and sell appears from the two writs of *fi. fa.* which are spread on the record, and his return on the back of these writs.

The court, states that the sheriff, according to the enunciative part of his conveyance, had no authority to sell.

This may be strictly correct, in relation to the *fi. fa.* in the case of *Laroque Turgeau* vs. *Dufour's heirs*, which is not recited in the conveyance. But the case is otherwise as to the

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one in *Camfranc* vs. *Dufour*, which is there recited.

The defendant cannot imagine that the statute is necessarily to be construed with so much rigor, that the words, *and others*, added to the title of the suit recited, must be considered as avoiding the seizure and sale.

Should it be objected that the sale of the slaves of the heirs of Dufour, being made and adjuged *in globo*, it is impossible to distinguish those who have been sold at the present defendant's instance, from those who were sold, at that of *Laroque Turgeau*—we answer that the sheriff's return on the respective *fi. fas.* will clear the doubt.

The attention of the court is particularly solicited to two parts of its decree, which, it is imagined, it will, on examination, deem to require some correction.

1. The court has decreed the slaves to be delivered to Dufour Delonguerue; while it is apprehended they ought to be restored to the sheriff, who had attached them.

2. The decree has adjudged the slaves to this gentleman, as heir of V. Dufour; while the plaintiff admits that he is so for one half of the estate only; the other half belonging to the minors Lafitte.

The judgments obtained by the present defendant, and by Laroque Turgeau, being recognised as valid by the decree, the seizure and sale under them, are alone avoided, and things ought to be replaced in the situation they were in, when those judgments were rendered. At that time, the slaves, since sold to the defendant, were not in the possession of Dufour's heirs, but in that of the sheriff, who had attached them, at the inception of the suits, in which these judgments were rendered.

No law authorises the delivery to a co-heir of the portion of another, who has not renounced the succession.

The heir, who has accepted part of a succession, acquires *jure accretionis*, without any act of his own, the share of a co-heir who renounces. *ff.* 29, 2, 53, *sec.* 1.

Pothier likewise thinks that the *jus accretionis* can only take place in case of the renunciation of a co-heir. *Traité des successions*, 228, 229, *sec.* 4.

Livingston, for the plaintiff. I deem it unnecessary to discuss any of the questions raised by the learned gentleman, but shall con-

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fine myself to the only point yet open in the cause—at what time should the defendant commence to pay hire for the slaves, purchased by him?

The defendant purchased in the year 1810, certain slaves, at a sheriff's sale, and received a conveyance which the court have decided to be one that could not pass any property. They have therefore directed the slaves to be restored, but have reserved for further discussion, the question, whether he shall be accountable for the wages of the slaves, and if at all, from what time.

The plaintiff contends, and as he believes, on principles which cannot be controverted, that the wages are recoverable from the moment the defendant came into possession.

1. The slaves were the property of the plaintiff; he has never been divested of that property, either by his own act, or by the operation of law; they have then never ceased to be his: but from the time of the sale, to this day, the defendant has received the proceeds of their labour. The proceeds of the labour of a slave belong to his master; therefore the defendant has received our property, and is bound by every principle of law and equity

to restore it. But, although these principles are acknowleged as generally true, yet it is said they are restrained in this state, by positive law, and that a possessor *bona fide* cannot be forced to restore the proceeds of the labour of slaves, although they never belonged to him. Any provision of law operating such unjust effects must be strictly construed. No law, permitting one to enrich himself at the expence of another, without his assent, can or ought to be favored; if courts carry it beyond the letter of the law, it appears to me, that they legislate, and I should say, that their legislation is neither legal nor wise. Nothing seems more incontestable than that—no one has a right to the use of my property, unless by my consent or the operation of law; if positive statutes have in certain cases contravened this principle, even tho' we should not acknowlege its justice or wisdom, we must submit; although I cannot myself see why a legislature should be permitted to give to another the use of my property, without my consent, when they are restricted from depriving me of the benefits I may derive from a contract; the one is no more my property, my right, than the other. Without raising any

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constitutional question, let us see what the law is on the subject:—

How far has this exception been carried? I do not mean by the courts; they have clearly no right to create or extend it, but by the legislature. The only expression of their will that is relied upon, is in the *Civ. Code*, 102. They begin by an unequivocal affirmance of the principle I contend for. "All that is produced by a thing, whether moveable or immoveable, belongs to the owner of that thing." "The produce of the thing does not belong to the simple possessor, and must be returned with the thing to the owner, who claims the same, except in case of the detainer having possessed it *bona fide*." The *bona fide* possessor then is the only one not bound to restore the fruits. Who is the *bona fide* possessor? The next article gives us the answer. "The *bona fide* possessor is he who has possessed as owner, in virtue of a transferable title of the property, (*titre translatif de propriété*;) but erroneous and defective, whose defects, however, he was ignorant of." Let us apply this definition to the facts in this case:

1. As to the nature of the title under which the possession was held in the English part

of the text, it is inaccurately, almost unintelligibly expressed, it must be a transferable title, meaning probably such a title as would, if the person who made it, had the property vested in him, have been sufficient to transfer the property; to give any other construction to the words, would render the expression, *translatif de proprieté*, totally inoperative; because if a conveyance so erroneous and defective, as not to pass the property, were to make him a *bona fide* possessor, merely because he was ignorant of the vice of the conveyance, then there would be no use in the terms *translatif de proprieté*; whether it were in its form sufficient to transfer the property or not, would then be immaterial; the only enquiry would be, was the party ignorant of the defects? If he were, he would be a *bona fide* possessor, and entitled to the profits; but the law has used these words, they must therefore have their effect; and if the conveyance is not in form, such as would transfer the property, the holder under it, is not by the terms of this definition, a *bona fide* holder. Now, the conveyance in question has been determined by the court to be one, by which no property could pass, and they determined this upon no other

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evidence than that which the defendant had before him at the time he purchased: therefore we come to this double conclusion. First, that this is not a title *translatif de proprieté.*— Second, that he was not ignorant of its defects. Yet, both of these must unite; for if the title be not *translatif de proprieté*, it cannot protect him, whether he knew the vices or not, and even if it were *translatif de proprieté*, if he knew the defects, it will not protect him.

As these are the material points in the case, perhaps it may be proper to develope both of them somewhat further—

On these points, every thing I could say has been strongly expressed in the opinion given by this court, in the judgment now under consideration, and I refer to all that part of it which considers the validity of the sale as conclusive, both by its reasoning, and the authorities it cites, to shew that this is not an act which could transfer the property. The judgment and execution are as necessary as the sheriff's deed to transfer the property, but here there was neither judgment nor execution; how then could the property be transferred, when two out of three of the requisites were wanting. An attempt is made

to apply to this case, the doctrine relative to deeds which are good in their form, and which would transfer property, if the grantor had a title. But the cases are widely different; the purchaser here knew that the property did not belong to the sheriff; the deed itself purports that it conveys the property of the heirs of V. Dufour, not the property of the sheriff; the purchaser knew that the sheriff could only sell when he had an execution, and where there was a judgment to warrant it; he ought therefore to have satisfied himself as to these points; the one was attended with no difficulty, the other with very little; if there were an execution, it must have been in the sheriff's hands, nothing easier then than to shew it; if the defendant did not choose to make use of this most ordinary diligence, can he make use of his own gross neglect to excuse his want of knowlege? But ignorance is not enough, if he had reason to doubt, *dubitatio et ignorantia in omnibus nocet, etiam in singulis. D.* 41, 4, 6, *in notis, n.* 42. He must be presumed to have known the law, by which the only authority which a sheriff could have, was an execution: common sense must have taught it him, and if he knew it, he ought to have enquired for the

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execution; and if he had, it would have been found that there was none to warrant the sale. But suppose him so ignorant as not to know that an execution was necessary, he could not have read the deed without learning it; for it is there set forth as the authority of the sheriff; if he was still so stupid as not to perceive this, it will not avail him. *Juris error nulli prodest.* If I purchase from a minor, believing him to be of age, I am in good faith, because this is an error of fact; but if I know him to be a minor, but believe that a minor can convey, I am in bad faith, and cannot prosecute under such a sale, *quia juris error nulli prodest. D.* 41, 4, 2, *sec.* 15.

It has been said, that in this case there was an error in fact, not in law; that there is an execution, and a judgment recited, and that Camfranc might have believed that they existed as they were recited—to this I answer—

1. By repeating that voluntary ignorance shall not protect him; that common prudence required of him to ask for the sheriff's authority, which if he had, it could have been produced in a moment; suppose A should pretend that he is the attorney in fact of B, and as such, should convey B's lands to C, who

should take the conveyance without asking to see the power? Can it be doubted that this would not be a title *translatif de proprieté*, if B had never given any power at all? If a power had been produced, and it should prove to be forged, the case might be different; because here would be a just reason to believe that the party had a right to convey; it is not enough to believe it; but the belief must have a just foundation.

2. I answer, that Camfranc did know, and could not but know, that there was neither judgment nor execution to warrant the sale. The deed recites, that it was made in "a suit of J. B. Camfranc and others, against the heirs of L. V. Dufour;" now as he was J. B. Camfranc, he could not but know that he had never obtained any such judgment, or issued any such execution; he was not then mistaken in the fact; his mistake, if any (but certainly he has shewn none) was in the operation of the law which required the true recital of the judgment and execution; but that, as we have seen, shall not avail him.

The *bona fides*, required to retain fruits, is the same as that required to prescribe; the species of title is the same; yet in those cases,

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although the circumstances of the case preclude any idea of an actual design to defraud, yet, because the ignorance proceeded from an error of law, because it was such as might have been removed by common caution, the courts have uniformly declared that conveyances having legal defects were not such as transferred the property, and could be no foundation for prescription, although the party may have believed them to be good.

In the case of *Francoise* vs. *Delaronde*, there was not the slightest suspicion that the defendant had not acted with perfect good faith; he believed the order of the judge sufficient, but he was mistaken; and the court declared that the conveyance could not be a foundation for prescription; indeed it appears to me, that having once determined that it is not a title by which property can be transferred, the court has no other power; that the consequence is declared by the law, and must inevitably follow, that it can neither support prescription, nor be a reason for retaining the fruits.

This consequence appears to me inevitable; the law declares that the fruits shall be restored in all cases, except those where the possessor holds under a title by which pro-

perty may be transferred; the court say that this is not such a title, therefore the defendant does not come within the exception, and of course, falls under the provision of the general rule which requires that he should restore the fruits. Of what use is it then to enquire what have been the decisions of courts, the opinions of jurists, in other countries? Whatever they may be, or may have been, if our law be clear, we but bewilder ourselves in the search after uncertain rules, when we have one to recur to that is clear, and is the only one that has any authority to guide us.

Yet, even that search would produce a result very different from that which is imagined; let us see to what it will lead us.

Carlivallio, tit. 3, *Des.* 2, 4, 7, first goes into the enquiry, whether property sold in execution, under either of the following circumstances, is to be restored, *viz.*

1. Under an execution not formally nor legally issued, either because the due order in taking the property has not been pursued, or that a solemnity of the sale at auction, or of the citation,* has been omitted.

* By citation, here is meant the citation to be present at the sale, not the citation to appear at the commencement of the suit.

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2. When it has been struck off to the creditor, at a low price, with enormous lesion, or below one half of the just price.

3. When the plaintiff has procured the property to be struck off to himself, by the intervention of a third person.

Restitution, in these cases, he says, may be obtained, either on an appeal or by suit for the recovery of the property; and he says, in this case, the judges must decide that the debtor pay within a certain period to be fixed, the debt and costs and interest, and that the creditor restore the goods sold with the fruits. *Atque etiamsi confirmant sententiam executionis nihilominus jubere, ut si intra terminum arbitrarium ab eis statutum, debitor solverit debitum creditori, cum expensis et interesse, creditor restituet debitori bona vendita, cum fructibus.* And for this he cites these Spanish jurists, *Parladorio*, *Rodriguez* and *Volano*.

It seems impossible to produce an authority more applicable to the present case, and where the result is so precisely that which is contended for by the plaintiff; this it will be observed, is the course of proceeding, where relief is sought by appeal. Altho' the reason appears to be the same, yet as my author, in

his order of treating them, divides cases of appeal from suits for restitution, such as the present, we will follow him through the other case; it is found in the succeeding numbers, 8 and 9.

As to the second question, he says we must pronounce that the same thing must take place if the debtor should sue before an inferior tribunal for the restoration of property seized in excution, and irregularly or illegally sold to the creditor. But whether restitution of the goods is to be made with the fruits, or not, doctors differ; some deny it altogether, because this restitution appears to be given *ex gratia*, under our law; this reason fails, for nothing is done *ex gratia*, but by right under a positive law; a court may annex conditions to a favor, but can add none to a law; but, in a restitution which is made *ex gratia*, the fruits are not included; others, as positively affirm, that the restitution ought to be made with the fruits, as well because the fruits are implied in the words restitution, as because the creditor suffers no loss, when his debt is paid to him with interest; therefore he ought not to profit by another's loss; others finally distinguish thus: either, first, the execution is void

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on account of the omission of some form, and then, the whole debt being paid to the creditor, with interest, the property must be restored to the debtor, with the fruits. The same rule would apply, if there was any ill faith in the creditor, or a suspicion of fraud. Or, secondly, the execution is defective in justice, because the goods of the debtor were sold at an inadequate price, all the other forms being observed, and in that case the creditor shall enjoy the fruits, and the debtor recover the property without accounting for them.—Apply either of these opinions to the present case, and it will be found whether we consult express law or authority from opinion, that the plaintiff is as much entitled to the wages as to the negroes themselves.

In France, a natural child, whose tutrix received the fruits of the whole estate, under the sentence of a court of justice, when by law, she was entitled only to one half, was ordered to account for the fruits. 7 *Sirey, Part.* 2, 972. *Heritiers Lee* vs. *Eglie.*

I conclude by one argument, which I think, must be conclusive, even if we had no positive law on the subject. It grows out of the nature of the property. All that we have been

considering until now, relates to real property, which does not perish by the use. But the subject of our present enquiry is negroes, all of them have grown old in the service of the defendant; it is more than twelve years since he possessed them; more than the common calculation of the life of man; some of them have actually died, others are maimed, and all are lessened more than one half in value from age; if the risk of mortality and accident is ours, surely the wages, which are the only compensation for it, must be ours also. Suppose the negroes had all died during the pendency of the suit, we must still have paid the debt and interest, and would have received nothing.

If he who runs the risk of loss should also reap the advantage of any occasional gain, from the same cause, it would seem that no doubt ought to exist in the present case.— Why ought we to suffer the loss of the negroes who are dead? Because the thing perishes for the owner; *res perit domino.*— Why ought we to receive the fruits? Because the same law declares that the fruits belong to the owner.

There is an evident distinction also between the case of a re-entry under a claim a

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reméré, which is put by the defendant's counsel. There the party was put in possession by the owner, was suffered to remain so by his consent, the title was one *translatif de proprieté*, and therefore the fruits might justly be retained by the possessor; the same observations may be made as to the restitution for lesion; yet in that case even there appears, by the authorities he cites, to have been a great diversity of opinion.

But in our case every thing is different, there was no conveyance by the owner, no consent, no title that could transfer property. Indeed, *Pothier* gives the reason in the case of the *vente a reméré*, which shews it to be entirely inapplicable to our case. *C'est une suite du principe établi, que le reméré n'opérant la résolution du contrat de vente que pour l'avenir, tout ce qui est provenu de la chose vendue jusqu'au réméré doit appartenir au vendeur!! Poth. contrat de vente, n.* 405.

Pothier is also quoted to show that an error of law shall also protect against the restitution of fruits; but the case put in the Roman law, in the first place, is not our law. Secondly, it does not apply to the case if it were; because it is the case of a testament, the invalidity of which appears to have depended on

the fact; and thirdly, *Pothier* himself, in the same treatise, most fully and explicitly declares, that a *bona fide* holder is obliged to restore all the fruits, by which he has been made richer. *Vide Pothier Traité du droit de proprieté, n.* 423, 425, 430, 432, *&c.*

Moreau, in reply. We have nothing to do with the imperfections of the translation of the *Code*—the French text, in which it is known that work was drawn up, leaves no doubt.

Le possesseur de bonne foi est celui qui a possédè comme proprietaire, en vertu d'un titre translatif de proprieté, mais erroné ou vicieux et dont il ignorait le vice, &c.

In the English text the error and the vice of the title are confounded together by the conjunction *and*, which makes it read thus—"in virtue of a transferable title of property, but erroneous and defective." Whereas, by the French text, whether the title contains error *or* any other vice, the good faith of the possessor cannot be attacked, if he was ignorant of it.

Nothing more is required to destroy the argument that the transferable title must be perfect in its form. The just title, required as a basis for prescription, is one in its nature susceptible of alienating the property, such as

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sale, donation, or exchange, &c. This is the clear deduction from the 18*th law of the* 3d *Partida, tit.* 29.

"We therefore say, that if one person receive of another an immoveable thing, in good faith, either by purchase or exchange, or as a donation or a legacy, or by any just title, and keep possession of it during ten years, &c. such person will acquire the thing by prescription."

It is then by the nature of the title, and not its goodness, that we judge of the good faith of the possessor.

If, on the contrary, the possessor holds as lessee or usufructary, he can never acquire by prescription. *Part.* 3, *tit.* 30, *l.* 4 & 5.

We must thus understand the *Civil Code, art.* 7, 102. It speaks of a title in virtue of which he who is in possession believes himself proprietor, although he is not so in reality. If we construe it to mean a title exempt from every species of error or vice, there would be a contradiction in the other part of it, which supposes a defective one, and yet declares the possessor one of good faith, provided he was ignorant of the defects.

The question now before you depends on knowing if the vice in this title was one of

which the defendant might have been ignorant. Both the ancient and modern laws have made a great distinction between the cases of acquiring by prescription, or merely retaining the fruits.

In the Roman law the defect in title prevented prescription from running, but it must be such a defect that the possessor could not reasonably presume to be ignorant of, or of which he might easily have informed himself. *Domat, liv.* 3, *tit.* 7, *sec.* 4, *n.* 13.

Our *Code* goes farther, and declares, *que le titre nul par defaut de forme, ve peut servir de base a la prescription de dix et vingt ans. Code*, 488, *art.* 70.

It might therefore be said if Camfranc pleaded prescription in virtue of an adjudication, which the court has pronounced null, the defect of form must have been known by him. But, to enjoy the fruits, is the same rigorous doctrine in force? Surely not.

Thus *Ulpien* decides, that at Rome an error of law was not a good cause to prevent him who entered on a succession of which he believed himself heir, from making the fruits his own.

It is said the edict of *Adrien*, from which

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Ulpien takes this doctrine, was not in force in Spain. But *Rodriguez* in his translation of the digest, *lib.* 5, *vol.* 3, *tit.* 3, 146, does not say so. The civil law is considered as the common law of Spain. It is the same in France, and we see *Pothier* citing this passage of *Ulpien* and recognizing it as a principle of general jurisprudence.

A law of the *Partidas* too has sanctioned it. *Part.* 3, *tit.* 28, *l.* 39, and allows the fruits to the possessor in good faith, without requiring from him any other title. In neither the Roman nor Spanish law was title necessary; ignorance, either of fact or law, enabled the party in possession to make the fruits his own. Such also was the jurisprudence in France. *Pothier*, *Domaine de proprieté*, *n.* 395.

The only place in which a question is made in the Spanish law, of the title of him who claims fruits, is the *Partida*, 3, 28, 40; it enumerates several circumstances, in consequence of which the possessor will be considered of bad faith. The first is, where a person has sold his property in fraud of his creditors. The second, where he has disposed of it through fear or violence. The third, where the thing has been acquired contrary to the provisions of law.

The third case is stated to be where the purchaser buys at a forced sale, without observing the formalities prescribed to render it valid; but it is not every informality that will thus vitiate; it is where the adjudication has been made in secret.

In translating this law, an error has been committed, and though part of the blame may attach to me, still it is true that there is a mistake, and it is my duty to shew it.

It is thus given, "the third, where any thing is ordered to be sold by an officer of the court, and a purchaser buys it, without observing the formalities prescribed in such sales, &c."

According to this translation, all kinds of irregularities would be sufficient to make the purchaser one of bad faith, and prevent him from claiming fruits—but what says the original.

El tercero es quando alguno comprasse encubiertamente alguna cosa, de aquellas que mandasse vender el official de nuestra corte, contra la costumbre que deue ser guardada en venderlas.

This does not speak of him who buys, omitting certain forms, but of him who buys secretly, clandestinely.

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But our *Civil Code* has terminated all difficulties, in declaring that he who has a title of a nature to transfer the property, makes the fruits his own.

The whole question then turns on ascertaining if the vendee was ignorant of the defects in his title—of this there is no doubt, the act on the face of it was regular, the purchaser knew not a word of English; the question whether the property did not pass by adjudication, was at that time unsettled; it is admitted to have been one not very clear. Can the defendant then be responsible, for not knowing what learned advocates might well have doubted of, and wise judges have found it necessary to pause on?

PORTER, J. delivered the opinion of the court. The circumstance of this case having been once remanded, with the intimation of an opinion on one of the principal points, rather different from that lately expressed by the court, joined to the earnestness with which an application for a rehearing has been pressed on us, has induced a very patient and particular attention to all the arguments offered by defendant's counsel. After attentively

weighing every thing advanced, we are obliged to refuse the application.

On the first point, it is insisted that the deed of sale by the sheriff is not of the essence of the contract; that the adjudication transfers the property; that the deed is only the evidence of this transfer.

Admitting this position to be correct, it by no means follows that other evidence than the deed can be received of the adjudication. A contract is complete, in the definition given by the *Civil Code*, when there is the consent of the parties—the capacity to contract, a determinate object, forming the matter of an engagement, and a lawful purpose; yet, suppose all these in the purchase of a slave or a plantation; could the agreement be enforced unless there was evidence of it in writing?

But it is said that the exclusion of parol proof does not extend to sales made by authority of justice.

To this there are several answers.

Our law has provided, that all sales of immoveable property, shall be made by authentic act, or under private signature; and that all verbal sales of any of these things shall be

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null, as well for third persons, as for the contracting parties.

A sheriff selling land or slaves to a buyer, who pays the price agreed upon by the adjudication, is within the letter of the provision quoted.—And the contract thus formed, is within its spirit.

For the policy of our law, would be entirely defeated, if parol proof could be received to establish sheriff's sales of immoveable property; and our jurisprudence would be strangely inconsistent, if it had provided, that when land is claimed in virtue of the owner's consent, the demand should be rejected unless that consent was proved by written evidence, but if asked for, by the alienation which stands in place of consent, that it might be proved by parol.

The act of the legislative council, which prescribes the formalities to be pursued, when property is sold on execution, supports the construction we put on it; for it requires a written conveyance, only in case land or slaves are sold. It intended then to make a difference between them and moveables, and to preserve the distinction which runs through our whole law on this subject.

It is proper to observe, that this is not new doctrine in this court, as far back as June term, 1820, in the case of *Durnford* vs. *Degruys & al. syndics*, it was stated "the property in the land sold by the sheriff, has never been determined to pass by the sheriff's return. The law requires the sheriff to make out, and deliver a deed of sale to the buyer, and this is the period at which the property passes." 8 *Martin*, 222.

When therefore, the thing disposed of is immoveable, written evidence of the purchase must be produced.

Nay, more, such written evidence as is prescribed by statute.

This results from the principles already established by the opinion of the court in this case, and is supported by the authorities drawn from the Spanish law, which are there referred to; property can only be claimed from him, who was once proprietor, by his consent shewn that an other person should have it—lapse of time, from which that consent is presumed, or a forced alienation.—Now, if asked under the latter mode, it must be shewn that the alienation has been made in the manner prescribed by the authority

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which compels it; otherwise the purchaser may have a conveyance, but he has not one under the law, and that alone can stand in place of the proprietor's consent. The act already referred to, directs the sheriff to give a title in a particular form, and is so jealous of any other being introduced, that it prohibits the deed being recorded, or read in evidence, if there are any material interlineation or alteration therein, which shall not have been noted before signing.

All laws, which deprive the citizen of his property, against his wish, must be strictly pursued by those who claim the benefit of them.

There is great error in imagining that the court is influenced by any common law idea, in coming to this conclusion. It is a fact familiar to every one acquainted with that jurisprudence, that the purchasers at sheriff's sales, under a judgment of a court governed by it, take the property, without being in any way responsible for previous irregularities—all that they are required to look to, is that there is a judgment. A strange anomaly it is in that system—and one which we would not, if we had the power, wish to introduce here.

The second point made, is, that the court should have ordered these slaves back into the hands of the sheriff, because they were once attached in two suits, one at the demand of the present defendant, and the other at the suit of Laroque Turgeau.

We understood this to be an action in which the plaintiff claimed slaves descended to him from his ancestor. The defendant pleaded title to the property, in virtue of sales made under judgments rendered against the plaintiff and his co-heirs. This title, we thought, was not made out, and we decided that there be judgment for the petitioner; but we added, as the law required us to do, that as the purchaser's money had been applied to the discharge of the plaintiff's debts, he must reimburse the buyer, before he could take the thing sold. In coming to this conclusion, we considered Camfranc as purchaser at sheriff's sale, and in that character alone, and so expressed it. The rights which he had in virtue of his former judgment, were not in any respect affected by the decree rendered, any more than those of Laroque Turgeau, or his heirs. The only question considered and decided, was the legal title between owner and

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purchaser, and the circumstance of Camfranc being plaintiff in a suit, under which it did not appear he had bought, could not in any way affect our determination.

Nor do we see that his rights require we should make such an order, if we had the power. It is not necessary to give effect to a *fieri facias*, that the slaves should be in the sheriff's hands when it issues.

The error into which the counsel has fallen arises from a misconception of the opinion already rendered. In his supplemental argument, he states, that the court having maintained the judgments, in the cases of *Camfranc* vs. *Dufour*, and *Turgeau* vs. *Dufour*, but annulled the sales, made in consequence of these judgments, ought to restore every thing to the same state. The court has not annulled the sales made in consequence of those judgments. It considered there was not legal evidence of the sheriff having sold the slaves sued for, under any judgment, as he recited one in his deed, which the purchaser would not, or could not produce.

On the last point, that judgment cannot be given for all this property, because there are other heirs who may yet accept, we have not

had any difficulty. The heir, who is now before the court, until the succession is liquidated, has a right to take the whole estate; we know not but it may be all required to pay the debts of the ancestor. As he has accepted with the benefit of an inventory, he is entitled in the first instance to the possession and administration of the deceased's property. *Civil Code*, 108, *art.* 104.

We directed the cause to be remanded, in order to obtain evidence what the hire of the slaves amounted to. It has since been suggested to us, that the parties could terminate the litigation between them, if they had the opinion of the court whether any hire is due, and for how long.

To aid them in this intention, we have attentively listened to their arguments, and we have formed a conclusion on the authorities cited, and the reasons urged in support of them.

The question appears to us, to lie in a very narrow compass. The elementary doctrine is, that a possessor in good faith does not owe fruits until after judicial demand. *Domat, liv.* 3, *tit.* 7, *sec.* 3, *art.* 5. *Civil Code*, 102, *art.* 6 *and* 7. And that good faith is ordinarily tested by enquiring whether the defect in the

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title (if it is one of a nature to transfer the property) proceeds from a vice in the form, or a want of right in the person who conveyed; in other words, if it is an error in fact, or an error in law, under which the purchaser holds the object claimed.

It has been urged on the part of the plaintiff, that the defect existing here was of the latter kind, and he has relied on the case of *Francoise* vs. *De Laronde*, 8 *Martin*, 619, as a positive authority in support of this position. We cannot agree with the counsel, and we believe a fair distinction exists, and can be shewn between that case and the one now presented for decision.

The article cited from the *Code*, 103, *art.* 7, is nearly the same with that found in *page* 488, *art.* 68, which defines the just title, that is the basis of ten years prescription, *longi temporis*. The authorities which apply to the one, will illustrate the other.

Pothier tells us that a just title is that which is of a nature to transfer the property; so that when it is not transferred, it is a defect of right in the person who makes it, and not a defect in the title, in consequence of which the tradition is made, *Pothier*, *Traité de prescrip-*

tion, n. 57—he adds in the same treatise, *n.* 85, that a title void in itself, will prevent him in whose favor it was executed, from pleading prescription; and our *Code* says, when the title is null from a defect in form, the party cannot prescribe under it. *Civil Code*, 488, *art.* 70.

Let us apply this doctrine to the case before us.

The title presented here is perfect as it respects form; it pursues the very words of the statute; the defect is a want of right or authority in the sheriff to make such a conveyance, not a defect in the manner he made it. As nothing, therefore, appears on the face of the deed which is defective, the knowlege of want of right, in the person who sold, is not brought home to the vendee, and his error was one of fact, not of law. It is difficult to see where is the difference between this case and an ordinary one of sale, where the purchaser acquires, from a person who has no title, by a regularly executed act, before a notary public; in such case the buyer acquires none, but he has that good faith which enables him to plead prescription.

The plaintiff has assimilated this to a con-

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tract, entered into with a person who acts as attorney in fact for another. In such a case it is said, if the agent had no authority, the buyer would be in bad faith; if he had one which was forged, the purchaser would be a *bona fide* possessor. We acknowlege the analogy so far as to admit that the sheriff acted here as an agent, but we cannot see any distinction in the cases put, and we think there would be as great an obligation in the vendee, to examine the verity of the written power, as there would be for him to enquire into the truth of the assertion of the seller, that he possessed one. We believe that in both hypotheses it would be an error of fact; one which the law would not consider of such a nature, as to prevent the party from pleading prescription. The rule is, that when the opinion of the possessor, who holds an object under a title of sale, has a just ground, though in fact there is no sale, the opinion is equal to title, *Pothier, Traité de prescription, n.* 96. *Digest, lib.* 41, *tit.* 4, *l.* 11. *Idem, l.* 2, *n.* 16. *Bonæ fidei emptor esse videtur, qui ignoravit eam rem alienam esse; aut putavit eum qui vendidit, jus vendendi habere. Digest, lib.* 50, *tit.* 16, *l.* 109. From every thing which appears in proof in the case, now be-

fore us, we have no difficulty in concluding that the purchaser honestly believed he had a good title, and had a just reason for that belief.

But it is said that in the suit of *Francoise* vs. *De Laronde*, it was held that the purchaser was responsible for the irregularities, which had taken place in the sale of minor's property. It was so held, and correctly; because, by *the 60th law of the 3d Partida, tit.* 18, the order of the judge, authorising the sale, the length of time it was advertised, and the fact of it being at auction, must be all expressly mentioned in the deed, in order that the purchaser may know what he buys. In that case the sale was not made in the form prescribed by law, and the buyer was justly told that he must be presumed to know defects which appeared on the face of the instrument by which he held the property.

It results from this view of the subject, that the appellee must pay hire for the slaves, from the date of filing the petition, and that the plaintiff owes judicial interest on the money paid by defendant; on the sum of four thousand and forty dollars for the same length of time—the former judgment, remanding the cause, to ascertain the value of the services of the slaves, does not require any alteration.

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DUUFOUR vs. *DELACROIX.*

Parol evidence may be received of the death of of a person where it does not appear any record was made of it.

APPEAL from the court of the first district.

PORTER, J. delivered the opinion of the court. This case is similar, in most of its circumstances, to that of the same plaintiff against Camfranc, *ante*, 607. The appellant proves title to the slaves, and the defendant offers a deed from the sheriff containing the same defect as that pleaded in the other suit. Our judgment must therefore be, that the plaintiff has shewn the better title.

There is one question, however, presented by this record, which did not arise in the other case. A bill of exceptions is taken to the opinion of the judge *a quo*, admitting parol evidence to prove the death of Auguste Dufour. The objection was made on the ground that it was not the best evidence the case was susceptible of. To sustain this exception, the defendant should shew that every man's death is recorded, or the evidence of it reduced to writing.

The testimony taken in the case yet before us, between the same parties, which is referred to and made part of the statement of facts in this, does not enable us to ascertain what

value we ought to affix to the services of the slaves here claimed; the cause must, therefore, be remanded for a new trial, for evidence on that head, and the appellee pay the costs of this appeal.

It is therefore ordered, adjudged and decred, that the judgment of the district court be annulled, avoided and reversed—that the cause be remanded for a new trial, to ascertain the value of the services of the slaves, and that the appellee pay the costs of this appeal.

Livingston for the plaintiff, *Seghers* for the defendant.

DUFOUR vs. *DELACROIX.*

APPEAL from the court of the first district.

When testimony is contradictory, it is the duty of the court to reconcile it, if possible.

PORTER, J. delivered the opinion of the court. This case involves the same points as that of the present plaintiff *vs.* Camfranc already decided. The title is established in the appellee, and the appellant claims under a sheriff's deed, which recites a judgment that has not been produced, and which we must, consequently hold, does not exist; *de non apparentibus et de non existentibus eadem est lex.*

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The question as to the length of time for which hire of the slaves should be allowed, has also been settled in the case just referred to. The defendant owes from the commencement of the suit until the present time; and the interest must be deducted for the same period.

As testimony has been taken to shew how much the labour of the negroes, who form the object of this action, was worth, we are enabled to make a final disposition of the cause.

Four witnesses were examined. The two first who were called on behalf of plaintiff, swore that the value of the slaves' services were $16 per month. The others on behalf of defendant, deposed that they might be worth from $120 to $150 per annum.

It is our duty to reconcile this evidence, if possible. To do so, we must understand the two first witnesses, as swearing to the price of hire for a single month, which we know is always estimated higher than when employment is secured by an engagement for one year.

The two others affix a sum between $120 and $150 per annum, rather, however, conveying the idea that the latter is nearer the

real value. We shall, therefore, allow $140 a year. From this sum must be deducted taxes and clothing: there is no evidence before us, as to the value of these items; but we suppose a proper sum would be $12 per annum.

In the case before us, the price of the slave was $750; interest for four years and nine months, at five per cent, added to this, makes the sum of $918 12 cents, from which is to be deducted the hire for the same space of time, $608; so that there will remain a balance of $310 12 cents, on the payment of which, to the defendant, the slave claimed in the petition must be delivered up.

It is therefore ordered, adjudged and decreed, that the judgment of the district court be annulled, avoided and reversed, and that the defendant do, on the payment or tender by the plaintiff, of the sum of three hundred and ten dollars, twelve cents, deliver to him the slave Scapin, claimed in the petition; that the appellee pay the costs in this court, and the appellant those in the inferior court.

Livingston for the plaintiff, *Seghers* for the defendant.

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DUVERNEY vs. VINOT.

DUVERNEY vs. *VINOT.*

APPEAL from the court of the first district.

A parish judge, charged with the settlement of an estate, cannot receive a reward for professional, or other services rendered therein.

MARTIN, J. delivered the opinion of the court. The plaintiff seeks to recover nine hundred dollars, which she alleges the defendant extorted from her, for his services, as parish judge, in the settlement of the estate of her deceased husband.

The defendant pleaded the general issue, and that for his services as parish judge, relating to the estate of the deceased, he charged and received his legal fees only; and that the excess was voluntarily paid as a compensation for other services, rendered by him as agent, and attorney in fact of the plaintiff, out of his parish, *viz.* in the city of New-Orleans. That, at the time she made him an allowance for these services, he told her they were judicial acts, and whatever she gave therefor was not required, but received as a voluntary compensation.

Bachemin deposed, that on the day of the inventory, he was on the gallery, near a window, thro' which he saw the plaintiff and defendant, in an adjacent room, and heard the former tell the latter, she wished him to do all

her business, not only as judge in the parish, but as her agent in New-Orleans, and she would give him $900. The defendant replied, that was much more than he would be entitled to, as judge; that his legal fees would not probably amount to more than $300, and he asked no more. She answered, she would give him $600 more, provided he would attend to all her business, as she would not meddle with them any longer.

Sometime after the sale, the witness told the plaintiff she had given too much to the defendant; she observed she thought not, as he was a friend of the family, had rendered many services, for which he had not received any thing, and might render more.

On his cross-examination, the witness declared he was married to the defendant's half sister. He did not know, nor heard of any other gift made to the defendant by any inhabitant of the parish, for similar services. He cannot tell whether the plaintiff can read or write; she appeared very much afraid of lawyers: there is none dwelling in the parish. C. Camel was present at the inventory, but in another room, at the time of the conversation related.

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Saucier said that three days after the sale of the estate, dining with the plaintiff at the defendant's, she told the latter she had given him $600 to settle all her affairs, and that every body was not so generous. He answered, that if she had any regret there was nothing done, and her affairs would be equally attended to, for what the law allows. She replied, she regreted nothing; he had informed her his fees would amount to $300 only; but, as he was to attend to all her affairs, in and out of the parish, and New-Orleans, she gave him $600; she knew he was a friend of the deceased.

The witness knew the defendant attended to the plaintiff's business in the city, and went thither several times, even when in a state of convalescence. In January, 1821, the witness carried a letter from him to her, which was read to the latter, by her daughter, and had been read to him by the former. She told him to say to the defendant, that there were evil talkers, and it was not true she had complained of him. She observed, that if the weather had been good, she would have gone to the defendant's to tell him this. She appeared anxious to explain the matter to the witness.

He knows, that after the sale, and before this conversation, she paid frequent and friendly visits at the defendant's, and slept there several times, with other persons of her family.

On his cross-examination, he added, the plaintiff never, in his presence, complained of the defendant; but he heard she said ill things of him about a month ago. He did not know that she had made a declaration against the defendant, which had been handed to the attorney-general, at the time he delivered her his letter. He does not know how the defendant learnt that she had complained of him. In reading his letter for the plaintiff, he observed to the witness, that he heard she complained of him, and had written to her about it.

Camel deposed, he was one of the appraisers of the property of the estate. At the close of the inventory, the plaintiff asked the defendant, how much he would charge for finishing all the affairs of the estate; he begged her not to make herself uneasy about it; he had been a friend of her husband's and the family, and his charge would be $900. She answered, he did not appear to treat her favourably, and he asked more than he was en-

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titled to. He observed, that if she took a lawyer, she would have to pay his fee as well as his own; she replied, that if she must pay this sum, she would do it. Bachemin was then on the gallery, on which the windows of the parlour open, near the place in which the plaintiff and defendant sat. Chesnu was in the parlour.

Chesnu deposed, he was present at the inventory, at the close of which, the plaintiff asked the defendant, what would be his charge for finishing all the affairs. He answered she well knew he had been a friend of her husband and the family, and she need not be uneasy about this. She insisted on being informed of the amount of his charges, and he said $900. On her observing he asked more than he was entitled to, he replied that she would fare worse, if she took a lawyer, as she would have two sets of fees to pay; she added that if she must pay that sum she would give it.

The witness was in the parlour, Camel was near the door; Bachemin on the gallery, near a brother of the deceased: another brother, and Latour were also there.

Masson deposed, the plaintiff came to him

in New-Orleans, to receive five dollars, lent him by her husband. He asked her who had charge of the affairs of the estate, she named the defendant: adding she had given him $900; he had told her his fees would not amount to more than three hundred dollars; but the additional $600 were for settling her affairs in the city, and out of the parish, as she wished not to be troubled with them, nor to have any thing to do with lawyers. She had preferred the defendant, as he had been a friend of her husband's.

The following is a translation of the defendant's receipt, annexed to the petition. "Received of Mrs. Widow Duverney, according to our conditions, for my costs, pains and cares, relative to the estate of her husband, nine hundred dollars, *viz.* $154 50 cents, which have been paid and adjudged, the 22d of July, 1820, at the sale made in this parish, and $745 50 cents, which she has paid me. Parish of Plaquemines, August 20th, 1820, M. Vinot, Judge."

The plaintiff obtained a verdict for $800, and judgment was accordingly given; the judge declaring himself satisfied with the verdict: but before the judgment was signed,

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the parties agreed that the verdict be set aside, the defendant withdrawing his call for a jury, and the cause was submitted to the court.

The district judge was of opinion, that as regards the charge of $300 for fees of office, there was a gross misrepresentation on the part of the defendant; for, it is impossible he could have been ignorant of the precise amount of his lawful fees. He, therefore, gave judgment against the defendant for $175 80 cents, the difference between the amount of fees according to law, $124 80 cents, and the sum of $300, represented to the plaintiff, by the defendant, as the probable extent of his claim as judge, with interest from the judicial demand.

He did not see any thing illegal or improper in the rest of the transaction.

The defendant appealed, and the plaintiff complains of the judgment, as withholding relief from her.

We think the decision of the district court correct, on the first part of the case, *viz.* the charge for fees.

It seems to us it was not equally correct, as to the charge of $600. It appears from

the testimony, that the plaintiff was induced to give that sum to avoid the payment of lawyers' fees; the services which such fees compensate, cannot legally be rendered by the judge. We have no evidence of the nature of the services rendered by the defendant, out of his parish. He is not known on record as an attorney at law. If he attended as an attorney, under a special power, in any suit, out of his parish, he might have shewn it. The plaintiff being left as a widow, to settle the estate of her husband, if she needed professional aid, is to be presumed to need it in her parish, or about the concerns of the estate.

Now, it is clear that a parish judge, charged with the settlement of an estate, cannot give professional aid therein.

Hence, the plaintiff, who, from the testimony, appears to have been induced to make an allowance, compensating professional services, either paid for such as were not rendered at all, or could not be properly rendered by the person who was thus rewarded.

We think that the sum of $124 80 cents, the legal amount of the office fees, is the

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only part of the sum received, which the defendant appears to be fairly entitled to retain.

It is therefore ordered, adjudged and decreed, that the judgment of the district court be annulled and reversed, and that the plaintiff recover from the defendant, the sum of seven hundred and seventy five dollars and twenty cents, with interest from the judicial demand; saving and reserving to him, his right against the present plaintiff, for compensation, if any be due for services, not inconsistent with his office: and it is further ordered, that the defendant pay costs in both courts.

Hennen for plaintiff, *Davezac* for defendant.

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APPEAL from the court of the first district.

Contracts made in a foreign country are governed by the laws of that country, in expounding them. But the remedies by which they are enforced, must pursue the forms, and be controled by the regulations of the country

PORTER, J. delivered the opinion of the court. This action was commenced on a promissory note, drawn at Philadelphia, by the defendant; who has pleaded that he was not indebted, and that on the 22d of June, 1818, he executed a deed of assignment to trustees, for the benefit of his creditors, and was regu-

larly discharged, under an act of the state of Pennsylvania, for the relief of insolvent debtors.

He has further averred, that at the date of the alleged contract, and ever after, until the time he took the benefit of the insolvent act already mentioned, both he and the plaintiff were inhabitants of Philadelphia, and citizens of Pennsylvania.

The certificate of discharge regularly authenticated, was produced on the trial; there was judgment for the plaintiff, and the defendant appealed. The only question, which the case presents, is the effect of this discharge in our state. By the terms of the certificate, the debtor is released from confinement, and his person protected against future arrest for all debts contracted by him previous to that time.

A contract made in a foreign country is governed by the laws of that country, in every thing which relates to the mode of construing it; the meaning to be attached to the expressions, by which the parties may have engaged themselves, and the nature and validity of that engagement, *Emerigon, Traité des assurances, chap.* 4, *sec.* 8. *Digest, lib.* 21. *tit.* 2. But it is clear that the remedy, by which it is

where the suit is brought

Hence a discharge in a sister state, which liberates the person of the debtor, but leaves the contract in force, does not protect him from imprisonment here.

The maxim *actor sequitur forum rei* is a part of the public law, or law of nations.

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enforced, should be sought according to the laws of the place where the party is pursued; that the form of procedure, the mode of trial, and the nature of the relief accorded, must be in pursuance to the regulations existing in the country where the debtor is sued. This is the rule in all civilized nations; the maxim *actor sequitur forum rei* is a part of the *jus gentium*; *du droit des gens. D'Aguesseau, tom. 5. p. 53. Vatel, liv. 2, chap. 8, sec. 103. Emerigon, loco citato.*

Our enquiry, therefore, is narrowed to a single point; does the manner in which a judgment is carried into execution, make a part of the contract, or is it the remedy given to enforce it? To state this proposition, is almost to answer it; and we do not think it presents any difficulty, or is susceptible of a serious doubt. *Huberus* states, that in the execution of a sentence given abroad, the law of the place, in which execution is asked, must govern; not the law of the place where the judgment is given. *Huberus*, 6. 1, *tit.* 3, *p.* 26. 3 *Dallas*, 374, *in note.* And lord Kames, a lawyer of distinguished learning, who professedly wrote on the civil law, after noticing the maxim, *actor sequitur forum rei*, observes; whence

it follows that the form of the action, the method of procedure, and the manner of execution must be all regulated by the law of the country where the action is brought. *Kames on Equity, book* 3, *chap.* 8, *sec.* 4. *p.* 560, *Edinburgh ed.* 1800

It is a necessary consequence of these principles, that what is done in an other country, respecting that remedy, cannot controul the proceedings of the tribunal where the party is sued. Other governments may modify their writs of execution, as they please; may abolish imprisonment for debts of any kind; or refuse it where the debtor is in such circumstances as the defendant now before us was placed. But so long as the contract exists, we must follow our own mode of doing justice, not that which it has pleased other states to adopt. This principle is acted on by other courts. In New-York they hold that a discharge from imprisonment, in the place where the contract was entered into, will not prevent the debtor from being arrested, when he comes into a different and independent jurisdiction. 11 *Johns.* 194. 2 *Idem*, 198. 14 *Idem*, 346. It is true, in the state where this note was made, a contrary doctrine seems to

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have crept into their jurisprudence; but the reasons given for its introduction, are not satisfactory to us, and they cannot be reconciled with the general principles of law, which govern cases of this description.

It has been argued that as both plaintiff and defendant were citizens of the same state, they must be presumed to have contracted in relation to those laws. Conceding this; all that they can be understood to have agreed on was, that in Pennsylvania the debtor might be discharged from imprisonment. When causes are required to be decided on the ground that the parties understood what the law was, and, as it were, incorporated it in their contract, 16 *Johns.* 233; they must be presumed to have known its limitations also, and have inserted them too in their agreement.

It was urged that it appeared from the record of the proceedings in Philadelphia, that the plaintiff was a party to that action, and, consequently, the judgment discharging the defendant from imprisonment, forms *rem judicatam.* It has the authority of the thing judged so far as it acted on the rights of the parties, and the question as to the imprisonment of the appellant in that state, is conclud-

ed by the judgment there given. But nothing more is decided by it.

Finally, it was said, before the decisions of the highest tribunal in the union had declared the insolvent laws of the several states unconstitutional, we should have held a discharge in a sister state binding on us here; and it was asked what reason could exist, why we would not recognise it, so far as it is admitted to be within the limits of the constitution? To this there is a satisfactory reply. The discharges, held by the supreme court of the united states as void, dissolved the contract, and that now before us leaves it in full force. In the case first put, we should probably have held, between citizens of the same state, that as the obligation was destroyed by the same law which created it, it must be recognised every where else as annulled. But here the proceedings merely discharge the person. So that this point, and in truth, every other raised in argument, depends on the main question in the cause; does the want of a remedy to enforce a contract in one country deprive the creditor of the benefit of that which is given him in another? We are all clearly satisfied it does not.

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It is therefore ordered, adjudged and decreed, that the judgment of the district court be affirmed with costs.

Maybin for the plaintiff, *Hennen* and *Smith* for the defendant.*

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* The remaining cases of this term will be continued in next volume.

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OF

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4 The syndics of the lessee do not represent the landlord so as to avail themselves of this privilege. *Same case.* . . . id.

LAWS

Which deprive men of their property, without their consent, should be strictly pursued. *Dufour* vs. *Camfranc.* . . . 607

LOUISIANA,

The state of, is on an equal footing with the original states, and not bound by any condition subsequent, annexed to her admission. *State* vs. *Orleans Navigation Company.* . . 309

MINOR.

The child who has approved of the partition, since he came of age, cannot maintain an action on account of its illegality. *Westover & al.* vs. *Aimé & wife.* 443

MORTGAGE.

See ABSENTEE, 3 & 4---EVIDENCE, 4 & 5---PARTNER, 9—PROMISSORY NOTE, 3.

ORLEANS NAVIGATION COMPANY.

1 Their charter is not unconstitutional. *State* vs. *Orleans Navigation Company.* . . 309

2 Nor affected by any act of congress. *Same case.* *id.*

PARISH JUDGE.

A parish judge charged with the settlement of an estate, cannot receive a reward for professional services rendered therein. *Duverges* vs. *Vinot.* - 722

See DEED, 1.

PARTITION.

If heirs, in dividing the estate, execute a reciprocal deed of sale, it will be considered as one of partition. *Westover & al.* vs. *Aimé & wife.* 443

See HUSBAND & WIFE, 5----MINOR.

PARTNER.

1 The signature of one binds the firm, in affairs which are not privately his own. *Arnold* vs. *Bureau*. 213

2 A partnership to do commission business, is not a particular partnership. *Ward* vs. *Brandt* & *al. syndics*. 331

3 It is unnecessary that the firm should contain the names of all the partners. *Same case*. . *id.*

4 In an ordinary commercial partnership, the members are bound *in solido*. *Same case*. . *id.*

5 Hence, they cannot receive what may individually be due to them by the firm, until the common creditors be all paid. *Same case*. . *id.*

6 Private debts cannot be set off against a partnership debt. *Same case*. . . . *id.*

7 Debts not arising from a consignment may, in case of insolvency, be proven against a commission house. *Same case*. . . *id.*

8 Persons, sending property to be sold on commission, have no privilege as to the proceeds, unless traced and identified in the insolvent's hands. *Same case*. . . . *id.*

9 A mortgage executed by two members of a firm, after the acting one had obtained a respite, is of no avail. *Same case*. . . *id.*

10 A partnership to carry on business as ironmongers, is not a special or corporate partnership. *Norris' heirs* vs. *Ogden's executors*. 455

11. In an ordinary partnership, dissolved by the death of one of its members, his heirs have a right to participate with the others in the liquidation. *Same case*. . . *id.*

12 If a suit be commenced by one of the firm, for a partnership debt, the others may intervene. *Same case.* 455

13 *Aliter*, as to one having a joint interest with the defendant. *Same case.* . . . . *id.*

See EXECUTOR, 4----INSOLVENT, 5 & 6.

POLLICITATION.

See CONTRACT, 5.

PRACTICE.

1 Answers to interrogatories, must be taken together, they cannot be divided. *Bradford's heirs* vs. *Brown.* . . . 217

2 The defendant cannot plead in bar that the plaintiff brought a suit for the same cause of action, which he dismissed. *Jackson* vs. *Larche,* 284

3 Nor that other persons have sued him for the same trespass, and that the suits must be cumulated. *Same case.* . . *id.*

4 The court may permit counsel to reduce to form the answer of a jury, on an issue submitted, and hand it to them for their consideration. *Same case.* . . . . *id.*

5 Neither the petition nor the citation needs be in the French language. *Fleming* vs. *Conrad.* 301

6 But copies must be served in that and the English languages. *Same case.* . . *id.*

7 If the return shew that copies of the petition and citation, were served on the defendant, it will be presumed they were so, as the law requires. *Same case.* . . . *id*

8 A judgment by default may be made final, even

when the object of the suit is the recovery of land. *Same case.* . . . 301

9 One who binds himself jointly and severally is a principal; and cannot avail himself of the pleas which the law gives to a surety alone. *Etzberger* vs. *Menard.* . . 434

10 Pleadings should not be argumentative, nor loaded with extraneous matter. *Norris' heirs* vs. *Ogden's executors.* . . . 455

11 If a claim be made in one capacity and proven in another, and no objection be made, judgment will be given on the merits. *Flogny* vs. *Adams.* 547

12 The validity of the sentence of a court of competent jurisdiction, cannot be inquired into collaterally. *Dufour* vs. *Camfranc.* . 607

13 It is on a plea in bar, conclusive evidence, between the parties, or those claiming under them. *Same case.* . . . *id.*

14 The defendant cannot amend, by withdrawing an answer which contains an admission, and pleading the general issue. *Vavasseur* vs. *Bayon.* 639

15 Inconsistent pleas cannot be received. *Same case.* *id.*

16 Appearing, pleading and contesting the suit on other ground, that the want of a citation cures the want of it. *Weimprender's syndics* vs. *Weimprender & al.* 17

See CORPORATION, 2—COSTS—LANDLORD, 8.

PRIVILEGE.

See ABSENTEE, 3 & 5—CONTRACT, 6, 8 & 9—INSOLVENT, 4—LANDLORD.

PROMISSORY NOTE.

1 Notice of non-payment, must be given on the day which follows the protest. *Canonge* vs. *Cauchoix.* - - - - - 452

2 A strict proof is required of the authority of a third person to receive notice in behalf of endorsee. *Montillet* vs. *Duncan.* . 534

3 A note, the payment of which is secured by a special mortgage, may be sued upon in the ordinary way. *Croghan* vs. *Conrad.* - 555

See HUSBAND & WIFE, 1 & 2.

SALE.

1 The assent of the vendee to an act of sale may be proven by matter *aliunde*. *Bradford's heirs* vs. *Brown,* - - - - - 217

2 He cannot be disturbed on account of lesion, in the sale by which his vendor acquired the land. *Same case.* - - - *id.*

3 The first sale is not therefore void. *Same case* *id.*

4 If the vendor wishes to avoid it, he must bring suit. *Same case,* - - - *id.*

5 Proof cannot be received of the insanity of a vendor, whose interdiction was not provoked. *Daunoy* vs. *Olyma & al.* - - 557

See ADJUDICATION—ALIENATION---SLAVE, 2.

SERVANT.

1 A cook hired for eighteen months, may be dismissed at any time. *Bethmont* vs. *Davis,* 195

2 If the master was bound to pay his passage back to France, his heir may receive the price of the passage, though the cook died pending a suit brought therefor. *Same case,* - *id.*

SLAVE.

1 It is no defence, in a suit on the part of the *Black Code*, which forbids the sale of spirituous liquors to slaves, that the defendant did not know the negro to be a slave. *Delery* vs. *Mornet.* - - - - -

2 In a redhibitory action, commenced within six months from the discovery of the defect in the slave, the plaintiff must shew the time of discovery. *Chretien* vs. *Theard.* -

TERRITORY.

1 Congress have power to govern the territories of the United States. *State* vs. *Orleans Navigation Company.* - - - -

2 And to establish territorial legislatures. *Same case.*

UNITED STATES.

A citizen of another state, praying for the removal of a suit into the court of the united states, must shew that the plaintiff is a citizen of the state in which the suit is brought. *Beebe* vs. *Armstrong.* . . . . .

WITNESS.

See APPEAL, 2, 3 & 13—EVIDENCE, 11.